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No. 428

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 12,152.

UNITED STATES OF AMERICA

v.

BENJAMIN N. LITMAN,

Appellant.

Appeal From Judgment of the United States District Court for the Eastern District of Pennsylvania.

APPENDIX FOR APPELLANT.

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APPELLANT'S APPENDIX

DOCKET ENTRIES

Sept. 13, 1956	Information, filed.
Sept. 13, 1956	Motion and order for Warrant, filed. Warrant exit.
Sept. 21, 1956	Bond of def. in $1000 with surety, filed.
Sept. 26, 1956	Warrant returned: "On 9-20-56 executed" and filed.
Dec. 3, 1956	Jury called and sworn.
Dec. 3, 1956	Trial—witnesses sworn.
Dec. 4, 1956	Trial resumed.
Dec. 4, 1956	Verdict—Guilty on each of counts 1, 2, and 3.
Dec. 5, 1956	Defendant's motion for judgment of acquittal and for new trial, filed.
Dec. 5, 1956	Argued sur motion for judgment of acquittal, etc. Denied.
Dec. 5, 1956	Sentence: Impr. for 60 days on each of 3 counts to run concurrently. Fine $500 on Co. #1. (Same bail continued pending appeal.)
Dec. 5, 1956	Judgment and commitment, filed.
Dec. 5, 1956	Bail bond on appeal in $1000 with surety, filed.
Dec. 7, 1956	Defendant's notice of appeal, filed.
Dec. 7, 1956	Copy of Clerk's Statement of Docket Entries, filed.

NOTES OF TESTIMONY

(3) Philadelphia, Pennsylvania
December 3, 1956
2:00 o'clock, p. m.

This case came on to be heard before the HONORABLE A. D. BARKSDALE, District Judge, and a jury duly impaneled and sworn to try the case.

APPEARANCES:

G. Clinton Fogwell, Jr., Assistant United States Attorney, of Philadelphia, Pennsylvania, Counsel for Plaintiff.

Leonard J. Schwartz, Esq., of Fox, Rothschild, O'Brien & Frankel, Bankers Securities Building, Philadelphia, Pennsylvania, and
John A. Bernheimer, Esq., of Philadelphia, Pennsylvania,
Counsel for Defendant.

The following proceedings were had at Bar:

Mr. Fogwell: Your Honor, Mr. Schwartz several (4) months ago asked us to delay arraignment until trial and, therefore, I think it must be done now, and we suggest it be done out of the presence of the jury, as is usually done.

The Court: He is going to plead not guilty, isn't he?

Mr. Schwartz: Yes, sir.

The Court: I think the thing to do is to waive formal arraignment and let the Plea of not guilty be entered. Is that satisfactory?

Mr. Fogwell: Yes, sir.

The Court: Let him plead not guilty then and let's proceed.

BEFORE THE JURY

The Court: A formal arraignment is waived and a Plea of not guilty is entered.

You may proceed with your statement.

THEREUPON, opening statement was made by Mr. Fogwell on behalf of the Plaintiff, and by Mr. Schwartz, on behalf of the Defendant.

WHEREUPON, the following evidence was introduced on behalf of the Plaintiff:

(5) KATHERINE C. BAKER, the first witness, called on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fogwell:

Q. Miss Baker, by whom are you employed?

A. By the District Director of Internal Revenue, in Philadelphia.

Q. In what capacity are you so employed?

A. Tax Accountant Specialist.

Q. Where is your place of business?

A. The 13th Floor of Gimbel's Building at 9th and Chestnut Street.

Q. That is right across the street?

A. That is right.

Q. Miss Baker, I show you a series of sheets of paper which I will ask the reporter to label Exhibit G-1, and ask if you are able to tell the jury and the Court what that is?

A. That is an income tax return for the year 1952.

Q. Whose return is it, if it is indicated?

A. It is in the name of Benjamin N. Litman and Bette E. Litman.

Q. Is the man's profession indicated there?

A. Yes, sir. It is indicated as a physician.

(6) Q. And the address?

A. 2433 North 52nd Street, Philadelphia.

Q. Are you able to pick out the gross income reported?

A. Yes, sir. The gross income total is shown as $86,646.18.

Q. I show you another series of sheets which the reporter at my request has labeled Exhibit G-2, and ask you if you can tell the ladies and gentlemen of the jury what those sheets are?

A. That is Income Tax Return for the year 1953, in the name of Benjamin N. Litman and Bette E. Litman.

Q. And the address?

A. 2433 North 52nd Street, Philadelphia.

Q. Can you give us the gross income on that return?

A. $73,670.43.

Q. And lastly, I show you a series of sheets which the reporter at my request has marked Exhibit G-3, and ask if you are able to tell the Judge and the Jury about that?

A. That is an Income Tax Return for the year 1954, in the name of Benjamin N. Litman and Bette E. Litman, 2433 North 52nd Street, Philadelphia.

Q. Would you return your eyes now to Exhibit G-1 again, the 1952 return, and on that do you find a place indicating on it as to when it was filed with the Revenue Service?

(7) A. Yes, sir. It was received March 16, 1956.

Q. Can you answer the same question about Exhibit G-2, the 1953 Return?

A. That also was received March 16, 1956.

Q. And Exhibit G-3?

A. That was received March 16, 1956.

The Court: The witness has not yet stated the gross income as shown on the 1954 return.

Q. Will you do that, Miss Baker?

A. The total gross income for the year 1954 is shown as $83,944.56.

Q. Now, Miss Baker, at my request did you bring with you a form which is called Form 899?

A. Yes, sir, I did.

Q. Will you be good enough to get it out and have it in front of you?

A. Yes, sir.

Q. Perhaps, Miss Baker, you would be good enough to tell the ladies and gentlemen of the jury what is known in the Revenue Service as the Form 899?

A. Form 899 is a certificate of all assessments and payments made from returns that have been filed by different taxpayers.

Q. Form 899 in front of you, has that been actually (8) prepared in this case by your department?

A. Yes, sir, it was.

Q. Do I understand you correctly that it shows the Income Tax paid, assessments, etc.?

A. Yes, sir.

Q. This particular form, what particular taxpayer is that concerned with?

A. Dr. Benjamin Litman and Bette E. Litman, 2433 North 52nd Street, Philadelphia.

Q. On this form what is the first year the form shows a return was filed or concerns itself with?

Mr. Schwartz: Just a moment. I object to that question. I thought the only years involved were 1952, 1953 and 1954.

The Court: That is my understanding. What are you addressing yourself to?

Mr. Fogwell: If your Honor will be good enough to turn to page three.

The Court: I am not going to turn to anything.

Mr. Fogwell: My understanding of the law is that tax activities of a previous year are admissible in a case of this nature for the reason they show a pattern.

The Court: And it is to that you wish to present proof?

(9) Mr. Fogwell: That is correct.

The Court: Do you still object?

Mr. Schwartz: Yes, sir. Does that mean we would have to defend every year in which there was a late filing?

The Court: I think the evidence is admissible in so far as it may go to prove knowledge and intent and purpose. The objection is overruled. You may proceed.

Q. Miss Baker, in case you don't remember the question, my question is what year do you have first discussed on this certificate you have?

A. The year 1948.

Q. What do you find, briefly, concerning this taxpayer as to whether a return was or was not filed in that year?

A. For the year 1948 an estimated Tax Return was not filed, but a regular 1040 Return was filed.

Q. How about the year 1949?

A. 1949 the same, the estimated Return was not filed but a 1040 Return was filed.

Q. And 1950?

A. 1950 no estimated Return was filed but the 1040 Return was filed delinquently.

Q. Now 1951?

(10) A. 1951 no estimated Return was filed but the 1040 was filed delinquently.

Q. I want you, if you can, to return your thoughts to 1948, and tell me when the return was filed.

A. For the year 1948 the Return was filed July 15, 1949.

Q. And the year 1949, when was the Return filed?

A. The year 1949—from this I am unable to give you the exact date of the return, since it was an even return.

Q. What do you mean by "even return"?

A. No payment was made at the time of filing, no tax was due.

Q. Now for the year 1950?

A. For the year 1950 the Return was filed in September, 1952.

Q. And the year 1951?

A. The 1951 Return was filed September 11, 1952.

Q. May I see your certificate there?

A. Yes, sir.

Mr. Fogwell: We move for the admission of Government's Exhibits which have been marked 1, 2, 3 and 4.

The Court: They may be admitted.

(11) (Thereupon, the said exhibits marked for identification as G-1, G-2, G-3 and G-4, were received in evidence.)

Mr. Fogwell: You may cross examine.

The Court: Do you wish to cross examine?

Mr. Schwartz: Yes, sir.

CROSS-EXAMINATION

By Mr. Schwartz:

Q. Miss Baker, on the Return for 1952 what net income does it disclose, what taxable net income?

A. The net income is shown as $14,803.33.

Q. And what tax does it disclose to be due?

A. It shows a tax due of $2,626.96.

Q. Miss Baker, looking at your Form 899, can you tell if the Doctor paid any estimated tax for the year 1952?

A. Yes, sir, estimated tax was paid in the amount of $845.00.

Q. When was it paid?

A. The first payment on the 1952 estimate was made March 15, 1952, $634.00. The next payment was made January 15, 1953, $211.00.

Q. Now looking at your Tax Return for 1953, will you please tell us what that return shows was the tax due for that year?

(12) A. The tax due is shown as $534.48.

Q. What was the net income for that year—I forgot to ask you that question?

A. $6,607.53 is the net income for that year.

Q. Now the return for 1954 shows what net income, Miss Baker?

A. The net income for 1954 is shown as $2,993.47.

Q. And what tax was due?

A. No tax due.

Q. And all those cases where you gave us the net income you gave us the net income before deductions in determining the net taxable income, did you not?

A. The deductions for exemptions. The expenses were deducted.

Q. That is right. Miss Baker, looking at Exhibit G-4 referring to the 1948 Return, how much tax was reported to be due on the 1948 Return?

A. $913.46.

Q. Was there any penalty assessed against that tax by your office?

A. No, sir, there is no penalty shown on that.

Q. There is nothing that shows a penalty abatement?

A. There is a $14.00 abatement but I cannot say what that would be. I cannot say there was any penalty but it shows (13) the tax and assessed interest.

Q. Due to the fact there was no penalty charged, is it your conclusion, from your knowledge of the records, that that return was filed within the time required by the law and regulations?

A. No, sir, I could not answer that. According to this it does not show any penalty but I could not answer that. There may have been an affidavit attached to the Return.

Q. You cannot look at that and say if an extension was granted for the 1948 Return?

A. No, I cannot.

Q. The 1948 Return was due, I suppose, March 15, 1949, and was filed July 15, 1949, was it?

A. That is right.

Q. If that Return was filed late a penalty would attach to the Return unless an extension of time was requested or affidavit filed giving a good reason for not filing the Return, is that the practice in your office?

A. Yes, that would be the practice.

Q. The 1949 Return, when was that filed?

A. That I cannot tell, for it is not a taxable Return.

Q. Does that mean there was no taxable net income or no tax due?

A. There may have been. I cannot tell other than it (14) was worked as an even return, which would be no tax due at the time of filing.

Q. What would that mean?

A. It is possible there could have been withholding, or from the return it could have been a return with enough tax withheld to offset the tax due.

Q. Assume this doctor was self-employed and no withholding involved, what would it mean when you have an even return?

A. It means we have no tax assessed on the return.

Q. The return was filed showing no tax due?

A. That is right.

Q. That was for 1949?

A. That's right.

Q. For 1950 what does your report show as to that return being filed?

A. That shows the tax return was delinquent and penalty was assessed.

Q. For 1950?

A. That is right.

Q. How much tax was involved?

A. $839.80.

Q. How much penalty was assessed?

A. $209.95.

(15) Q. Did the penalty stand?

A. An offer in compromise was submitted in lieu of the penalty.

Q. What happened to that?

A. An offer of $75.58 was made and accepted in lieu of the $209.95.

Q. So do I understand then after the penalty was imposed the Doctor submitted an affidavit showing the reason why he failed to file the return on time and offered $75.58 in payment of the penalty in excess of $200.00 and the penalty in excess of $75.80 was abated?

A. I cannot answer as to the affidavit. All I can read from this is an offer in compromise was made.

Q. Was it accepted?

A. It was accepted.

Q. What happens to the balance of penalty when you accept an offer of compromise?

A. It is abated.

Q. When an offer of compromise is made—does your office have anything to do with the offers of compromise?

A. I don't have.

Q. You don't know what the practice is either, do you?

A. No, I could not answer that.

Q. In 1951 what was the tax reported for that year?

(16) A. The tax reported on that is $844.06.

Q. What happened in that year, was any penalty imposed?

A. Extensions were granted that year until September 15, 1952.

Q. So no penalty was imposed?

A. That is right.

Q. Do you have a record, or does your record show what extensions were granted for the 1952 Return?

A. Three extensions were granted for the 1953 Return.

Q. I said 1952.

A. Excuse me, I meant 1952.

Q. When was the first extension granted?

A. June 15, 1953.

Q. And the second one?

A. August 18, 1953.

Q. And the third one?

A. September 15, 1953.

Q. Do you have a record of the extensions for 1953?

A. I would not have a record of the extensions.

Q. Do you have a record of the extensions granted for 1953?

A. It shows three extensions were granted on that.

Q. Do you have the dates?

A. June 15, 1954, August 15, 1954 and September 15, 1954.

(17) Q. Now do I understand you that these extensions of time are granted when the taxpayer or his representative applies for the extension in writing?

A. I would not be in position to answer that because my work does not go into that field.

Mr. Schwartz: That is all. Thank you very much.

The Court: Any redirect?

Mr. Fogwell: Nothing else, thank you.

(Witness excused.)

VINCENT D. DE BLASIO the next witness, called by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fogwell:

Q: By whom are you employed?

A. By the District Director of Internal Revenue, in the Philadelphia District.

Q. Where is your place of business?

A. 13th Floor of the Gimbel Building, Philadelphia.

Q. At my request have you brought certain papers and letters concerning Dr. Benjamin Litman?

A. I have, sir.

Q. Have you brought down certain extension requests (18), which concern the calendar year 1952?

A. Yes, sir.

Q. Can you open them and focus your mind on them there? Do you find one or more extensions requested?

A. I do, sir.

Q. And these letters and papers are they part of the regular records of your office?

A. They are, sir. They are stamped received and considered part of our records.

Q. They are kept in your department?

A. Yes, sir.

Q. What is the date of the first extension requested, Mr. DeBlasio, that you find there?

A. March 14, 1953. I have a request here directed to the Director of Internal Revenue in the name of Dr. Benjamin Litman, a request asking for a ninety day extension, over the signature of Charles Brahin.

Q. Do you have another extension request for that year?

A. I have an additional request on behalf of Dr. Benjamin Litman, over the signature of Charles Brahin, dated June 13, 1953, asking for an additional extension of time to August 15, 1953 for the filing of the 1952 Return.

Q. Does Mr. Brahin indicate his business?

A. Mr. Brahin is known as an accountant and auditor, (19) with offices at 1924 Arch Street, Philadelphia.

Q. Are these requests on his letterheads?

A. They are.

Q. The first extension request, does your record indicate if that was or was not granted?

A. Yes, sir, it indicates the extension was given to June 15, 1953.

Q. And the second extension request, which you told us you received June 13, 1953, was that or not granted?

A. That also was granted, to August 15, 1953.

Q. What reason is given in the first extension request?

A. It reads "due to my being over-burdened in my work."

Q. And the "my" is over whose signature?

A. Over Charles Brahin's signature.

Q. What reason is given in the second extension request for the calendar year 1952?

A. "Due to illness and my being over-burdened in work."

Q. Do you have a third extension request for that year?

A. I do, dated August 13, 1953, over the signature of Charles Brahin, on behalf of Dr. Benjamin Litman, and that was a final, which was granted until September 15, 1953.

Q. All right, and what reason is recited in that request?

A. "Due to my illness I was unable to complete the (20) taxpayer's tax report." He was referring to Dr. Benjamin Litman.

Q. So, in effect, the first two requests over Mr. Brahin's signature recite an excess amount of work, whereas the third one recites the illness of the accountant?

A. That is right.

Q. Is the second one or not signed by the defendant?

A. The second one does have the defendant's signature in addition to the accountant's signature.

Q. Do you have an extension request which concerns the year 1953?

A. I do, sir. On March 13, 1954 there was a request received by our office on March 17, 1954, in behalf of Dr. Benjamin Litman, over the signature of Charles Brahin. He asked for an extension of sixty days "due to my being overburdened with work I was unable to complete the taxpayer's tax reports," and extension was granted until June 15, 1954.

Q. And the second one was when?

A. The second one was dated June 14, 1954, and received in our office—when I say our office I mean the office of the District Director—June 15, 1954, over the signature of Charles Brahin, requesting an additional extension, and the reason being "due to my being ill and overburdened with work I was unable to complete the taxpayer's tax (21) reports." That was granted to August 15, 1954.

Q. Do you have a third one?

A. I do, dated August 13, 1954, received in our office August 16, 1954, over the signature of Charles Brahin, in behalf of Dr. Benjamin Litman, the reason being, "due to my being ill and overburdened with work I was unable to complete the taxpayer's tax report." That was marked "Final." He was given to September 15, 1954.

Q. Now again the first request concerns itself with the excess work of the accountant and the second and third requests concerns illness of the accountant, is that right?

A. "Due to my being ill," and "due to my being ill," yes, sir, that is correct.

Q. Do you have certain requests which concern themselves with the calendar year 1954?

A. I do, sir.

Q. What are those?

A. On April 15, 1955 is the first request, which was received in our office the same day, in behalf of Dr. Benjamin Litman, over the signature of Charles Brahin, the reason being, "due to my being over-burdened in my work," and an extension was granted to July 15, 1955.

Q. And the second one?

A. The second one was dated July 14, 1955, and received (22) in our office July 14, over the signature of Charles Brahin, in behalf of Dr. Benjamin Litman, the reason being "due to my being over-burdened in my work and unable to complete the tax return." Additional extension was granted to August 15, 1955.

Q. And the third one.

A. The third one was dated August 15, 1955, and received in our office August 16, 1955, in behalf of Dr. Benjamin Litman, over the signature of Charles Brahin, and that reason is "due to my illness I was unable to complete the taxpayer's tax report." That was granted until September 15, 1955.

Q. Do you have a fourth one?

A. Yes, sir, I have a fourth one dated September 15,

1955, over the signature of Charles Brahin, in behalf of Dr. Benjamin Litman, the reason being "due to my being ill and overburdened with work I was unable to complete taxpayer's tax report." That was the final extension and was granted to October 15, 1955.

Q. So for the calendar year 1955 four extensions were requested and four granted?

A. That is right.

Q. The first two concern themselves purportedly with excess work and the second two concern themselves allegedly (23) with illness of the accountant?

A. That is correct.

Mr. Fogwell: I move to have admitted these papers about which the witness has been testifying, which I have had marked Government's Exhibits Nos. 5, 6 and 7.

The Court: They may be admitted.

(Thereupon, the said papers were received in evidence as Government's Exhibits Nos. 5, 6 and 7, Vincent D. DeBlasio.)

Q. I take it, sir, in your work in the Revenue Service you are familiar with extensions for the filing of Income Tax Returns; is that right?

A. I am, sir.

Q. Are you familiar with the authority of the Commissioner as to how long Congress allows him to give extensions?

A. I am, sir.

Q. Can you tell us how long the maximum period is?

A. The maximum period is not to exceed six months.

Q. If you are able to give the jury the benefit of it, what are you relying upon when you say that?

A. The regulations which are issued by the Internal Revenue Service.

(24) Q. Is it, also, if you know, a statute of Congress?

A. Yes, sir, naturally in going on regulations we take it for granted that Congress does make the law.

Mr. Fogwell: You may cross examine.

CROSS-EXAMINATION

By Mr. Schwartz:

Q. Mr. DeBlasio, after the six months period, during which you are authorized to grant extensions, it is the practice of your office not to grant any more extensions on request; is that correct?

A. That is correct, sir.

Q. And if Income Tax Returns are filed beyond the period to which extensions were granted it is your practice to impose a penalty?

A. That is correct, sir.

Q. And the penalty is five percent?

A. Yes, sir, not to exceed twenty-five percent.

Q. I believe it is also your practice when a late Return is filed after the six months period, if the taxpayer can show good reason for not having filed the Return within the extent of the period, and your office is satisfied the reason is good, you abate the penalty, is that right?

A. That is correct, sir.

Q. Do you have correspondence, particularly a letter (25) addressed to your office by Dr. Litman on June 6, 1955?

A. No, sir. The only correspondence I brought with me were the requests for extensions, sir.

Q. Have you any correspondence between Dr. Litman and your office, or your office and Dr. Litman, apart from the extension requests about which you have just testified?

A. No, sir.

Q. Mr. DeBlasio, are you familiar with the requests for extensions of time coming to your office?

A. I am, sir.

Q. Have you seen a great number of them?

A. Yes, sir. The office ordinarily receives three thousand to thirty-five hundred requests for extensions a year.

Q. Do you see a great many of them?

A. I do, sir.

Q. Have you noted the reasons that are given for requesting the extensions?

A. There are many reasons given so far as extenuating circumstances go, as given by the individual themselves or the representative of the individual as in this particular case, those being as stated in this particular case are accepted reasons, or where the bookkeeper of a firm, or the records of a firm or individual get mislaid, or not mislaid (26) but do not get them completed on time because of illness of the bookkeeper or somebody in the record keeping unit for a particular individual, and under those circumstances we do grant an extension.

Q. Is it unusual to receive a request from an accountant based on the ground he cannot complete the return because of overwork?

A. No, sir, that is not unusual.

The Court: Roughly, how many returns are filed in your office?

The Witness: Between two and a half to three million returns, sir.

Mr. Schwartz: That is all, thank you, sir.

The Court: Any redirect?

Mr. Fogwell: No, sir.

The Court: You may stand aside. Call your next witness.

(Witness excused.)

WILLIAM F. LYNN, JR., the next witness, called on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Fogwell:

Q. Mr. Lynn, by whom are you employed?

(27) A. I am employed by the Intelligence Division of the Internal Revenue Service, Philadelphia, Pennsylvania.

Q. Where is your office located?

A. In the Gimbel Building.

Q. Do you know Dr. Benjamin Litman?

A. Yes, I do.

Q. When did you first have occasion to meet him?

A. I first met Dr. Litman on or about December 15, 1955.

Q. Where, sir?

A. At the Wynnefield Hospital, 1601 North 52nd Street, Philadelphia.

Q. That is Dr. Litman's place of business, so to speak, is it?

A. Yes, sir, it is.

Q. Did you identify yourself to Dr. Litman at that time?

A. Yes, I did. I was accompanied by an Internal Revenue Agent, and we introduced ourselves.

Q. Who was that Agent?

A. Mr. Golato.

Q. And the two of you called on Dr. Litman and identified yourselves?

A. Yes, sir, we did.

(28) Q. Did you explain to him your mission?

A. Yes, sir, we did.

Q. What did you tell him your mission was?

A. We told him we were investigating his failure to file Income Tax Returns for the years 1952, '53 and '54.

Q. At that time did the doctor tell you if he had or had not filed his returns?

A. At that time he told me he had not filed his returns.

Q. Did he tell you whether it was voluntary or accidental or what did he say, in brief?

A. Briefly he said he didn't file his returns because his son became sick and he was busy operating the hospital, and he also blamed his bookkeeper for taking some of his records.

Q. Among other things, Mr. Lynn, did you ask the doctor certain questions about his educational background?

A. Yes, sir, I did.

Q. Did you ask him where he went to college?

A. Yes, I did.

Q. What did he tell you?

A. He told me he attended Saint Joseph College in Philadelphia, from which he graduated, and that he took post graduate work at the University of Pennsylvania in 1935, and (29) went to Hahnemann Medical School from 1936 to 1940, and that he became a doctor in 1941, after serving his internship.

Q. You say this was in December, 1955 you discussed with him his returns for the calendar years 1952, 1953 and 1954?

A. That is right.

Q. Did he advise you over what period of time his son had been ill?

A. He advised me his son became ill in December, 1952 and that he was critically ill for about two weeks, and that it took about a year and a half for him to recover.

Q. Did you discuss with him certain books or books of account?

A. Yes, we did. We asked him what books he had and he briefly described the books he did have, and he told us the books were in possession of Mr. Brahin at the time, who was preparing his Income Tax Returns.

Mr. Fogwell: I have no further questions, sir.

The Court: Do you wish to cross examine?

Mr. Schwartz: Yes, sir.

CROSS-EXAMINATION

By Mr. Schwartz:

Q. Mr. Lynn, when you called to see the doctor, did you find him cooperative, did he cooperate with you?

(30) A. Yes, he did.

Q. Did he answer all your questions willingly?

A. Yes, sir, he did.

Q. After he told you that Mr. Brahin had the books and was preparing his Income Tax Returns did you go then to see Mr. Brahin?

A. I saw Mr. Brahin later on.

Q. How much later?

A. I believe about January 26, 1956.

Q. If I understand it you saw the doctor on December 15, 1955?

A. That is correct, sir.

Q. The doctor told you Mr. Brahin had his books and was preparing an Income Tax Return for all the years, and you did not see him until January 26, 1956?

A. That is right, sir.

Q. Was there any reason for a delay of approximately seven weeks before you saw Mr. Brahin?

A. Mr. Brahin had informed me he was going to file Dr. Litman's Income Tax Returns for him in December, the latter part of December, and those returns were never forthcoming.

Q. Did you see Mr. Brahin?

A. I spoke to him on the telephone.

Q. And he told you he was preparing the Doctor's Income (31) Tax Returns?

A. Yes, he did.

Q. And that is all your conversation with him?

A. We made arrangements whereby we would get together sometime and examine the returns and go over them and see what records he was using, etc.

Q. Do I understand from that answer Mr. Brahin invited you to look over his papers and material so you could be satisfied with the returns he was preparing for Dr. Litman?

A. Yes, sir, in fact the Doctor agreed to permit us to examine his records.

Q. Further than that did Mr. Brahin ask you to look over his figures and records on which he was basing the re-

turns, so you would be satisfied they were correct before he filed them?

A. We did see the returns after he filed them.

Q. That isn't my question. Didn't he ask you to look over the figures and records while he was preparing the returns so you would be satisfied the return he was preparing was correct?

A. He did ask us to look them over but we also told him the mere fact we looked them over would not mean that they were right, as we had at that point not made our own investigation.

(32) Q. You, also, had with you an accountant who was not a special agent on this case, did you not?

A. That is right.

Q. What was his name?

A. James Golato.

Q. Did he see Dr. Litman at the same time you saw him?

A. Yes, sir, he did.

Q. Was that December 15, 1955?

A. Yes, sir.

Q. Do you know, of your own knowledge, if the accountant met with Mr. Brahin after December 15, 1955?

A. Any meetings we had with Mr. Brahin, Mr. Golato and I were usually together, in fact we were together.

Q. Do I understand your next meeting with Mr. Brahin was on January 26, 1956?

A. That was our first meeting with Mr. Brahin and Dr. Litman, the second meeting with Dr. Litman, and first meeting with Mr. Brahin.

Q. When you met with Mr. Brahin on January 26, 1956, did Mr. Brahin show you his work papers?

A. His work papers were not complete at that point.

Q. But he showed you what he was doing as to the complete return?

A. Yes, sir.

(33) Q. After January 26, 1956 did you continue contact with Mr. Brahin or Mr. Golato?

A. We both continued our contact with him, we made a few more calls and conducted our examination at the hospital, and later at Mr. Brahin's office on Arch Street.

Q. Did you and Mr. Golato look over the work papers and the material on which Mr. Brahin was basing his returns for 1953, 1954 and 1955?

A. Yes, we did.

Q. How long were you at the office of Mr. Brahin after January 26, 1956?

A. That was in February we were in Mr. Brahin's office.

Q. How long were you and Mr. Golato continuously at his office?

A. I would say we were there about five or six times, possibly for three or four hours a day.

Q. You would say you were there only five or six times for three or four hours a day?

A. Yes, sir.

Q. Isn't it true Mr. Golato was there several weeks continuously?

A. Several weeks?

Q. Yes.

A. My recollection is about six or seven days we were (34) there. I don't know.

Q. Are you aware of a letter Dr. Litman wrote the Internal Revenue office dated June 6, 1955?

A. Yes, I am.

Q. Do you have the original of that letter?

A. Not with me here.

Mr. Fogwell: We have it here.

The Court: Do you wish it produced?

Mr. Schwartz: Yes, I want it produced.

The Court: All right, get it out for him.

(The witness went to a file on counsel table and produced a paper.)

Q. Do you have before you the letter of June 6, 1955, written to the Director of Internal Revenue, over the signature of Benjamin N. Litman?

A. Yes, sir.

The Court: What is the date of the letter?

The Witness: June 6, 1955, received in the Intelligence Division on June 8, 1955.

Mr. Schwartz: I will ask the reporter to mark this as Defendant's Exhibit No. 1.

(Thereupon, the said letter was marked for identification as Exhibit D-1, witness William F. Lynn, Jr.)

(35) Q. Mr. Lynn, that letter was written to the Director of Internal Revenue six months before you called at the office of Dr. Litman, wasn't it?

A. Six months before I called at the office of Dr. Litman?

Q. That is the question I asked you, six months before you called at the office of Dr. Litman?

A. That is right, six months before I called at the office of Dr. Litman.

Q. In that letter does Dr. Litman explain he intends to file a return for 1952 and 1953?

A. Yes, sir.

Q. And does he attempt to explain the difficulties he had in filing the returns?

A. Yes, sir, he explains the difficulties he had.

Q. Now when he wrote the letter of June 6, 1955, the Return for 1954 was not yet due, was it?

A. The 1954 Return was due on April 15, 1955, however, according to his accountant, Mr. Brahin, he had secured extensions.

Q. And as a result of the extensions no returns were due until October 15, 1955?

A. The 1954 return, that is correct.

Q. So w[illegible]here on December 15, 1955 the (36) return for 1954 was two months late, is that correct?

A. That is correct, sir.

Q. When you discussed the matter, who did you discuss it with, Mr. Brahin at his office?

A. What matter?

Q. The relationship of Dr. Litman and Mr. Brahin?

A. Dr. Litman told me Mr. Brahin was his accountant.

Q. Did you ask Mr. Brahin whether he was Dr. Litman's accountant?

A. Did I ask him?

Q. Yes.

A. Yes, I did.

Q. What was your answer?

A. My answer?

Q. What did he answer you when you asked him?

A. He said he was the doctor's accountant.

Q. Did he say for how long he had been his accountant?

A. He said he had been the doctor's accountant back to 1949 up to the present time.

Q. Did you ask Mr. Brahin whether he was engaged by Dr. Litman to file returns for 1952, '53 and '54?

Mr. Fogwell: I would like to object to that question. I don't want to be captious, but anything which Mr. Brahin told this gentleman would be strictly hearsay.

(37) The Court: I overrule the objection, he may answer.

A. He told me he was his accountant and Dr. Litman had told me Mr. Brahin was his accountant.

Q. Did he tell you he was engaged to file the 1952 return for Dr. Litman?

A. He said he was in process of preparing the 1952, '53 and '54 returns for him.

Q. Did he tell you in 1953 Dr. Litman had engaged him to file his 1952 return?

A. Yes, sir.

Q. Did he tell you in 1954 Dr. Litman had engaged him to file his 1953 return?

A. Yes, sir.

Q. Did he tell you in 1955 Dr. Litman had engaged Mr. Brahin to file his 1954 return?

A. Yes, he did.

Q. Did he tell you that he was unable to file notwithstanding his engagement, he, Mr. Brahin, was unable to file the returns for Dr. Litman?

A. Mr. Brahin told me he was unable to file the doctor's returns because the doctor's records were supposed to be missing.

Q. Did he tell you the records were missing for 1952 (38) and 1953?

A. Mr. Brahin?

Q. Yes.

A. Yes, he did.

Q. Let me refresh your recollection, didn't he tell you the records for 1952 were incomplete and he did not have a cash disbursement book for 1952?

A. That is right.

Q. Did he tell you what efforts were made to make up a cash disbursement book for 1952?

A. Yes, sir.

Q. He did?

A. Yes, he did.

Q. Didn't he tell you that after a Mr. Kruger left the employ of Dr. Litman in 1953, December, 1953, that part of the 1952 cash disbursement records, and part of the 1953 cash disbursement records were missing?

A. Yes, he told me they were missing.

Q. And didn't he tell you after the records were missing what personal efforts he had made to find those records?

A. Yes, sir.

Q. And didn't he tell you after December, 1953, when Mr. Kruger left that checks, cancelled checks and check books were missing?

(39) A. Yes, sir.

Q. And that he personally looked for those cancelled checks and check books and was unable to find them?

A. Yes, sir.

Q. And didn't Mr. Brahin tell you that he and the doctor had searched many, many times for them, and were unable to find them until some time in June, 1955?

A. Yes, sir.

Q. And didn't he tell you that he found possibly cash disbursement sheets in 1952 and 1953 among medical records?

A. Yes, sir.

Q. And is it not true the medical records consisted of folders slightly smaller than this (indicating) containing case histories, packed in boxes?

A. I don't know what records he found them among, because I did not look at those records.

Q. Did he describe to you what those medical records consisted of?

A. He mentioned there were old medical records is about all he said about them.

Q. Didn't he tell you he spent hours and hours looking among these old medical records finding several sheets of cash disbursements here and there, and only after he was able to find the cash disbursement sheets and cancelled checks and (40) check books was he able to reconstruct the records of the doctor and file a return?

A. That is true.

Q. He told you that?

A. Yes, sir.

Q. Are you familiar with the Wynnefield Hospital and how it operates?

A. Only from what Dr. Litman told me about it.

Q. Do you know the kind of help employed at the Wynnefield Hospital, the clerical help?

A. I met some of the people.

Q. Did Mr. Brahin tell you one of the problems he had was that the help was not competent and did not adequately complete the cash disbursement books for 1952 and 1953?

Mr. Fogwell: We must bear in mind Mr. Brahin was not there and would not have details of the operation of the hospital and its personnel, and the best evidence would be Mr. Brahin himself.

The Court: Mr. Brahin was the accountant of the defendant, and you have asked him questions about his going to Mr. Brahin, and I think it is competent testimony, and I will admit it. The objection is overruled.

A. Dr. Litman told me that.

(41) Q. What did Dr. Litman tell you about that?

A. He said he had difficulty with the personnel. He said he didn't pay them too much money and for that reason he had a hard job retaining personnel.

Q. Did he explain about having a large turn-over in help?

A. Yes, he did.

Q. Have you had occasion to be familiar with other hospital operations?

A. No, sir.

Mr. Schwartz: That is all, sir.

The Court: Any further redirect?

Mr. Fogwell: Yes, sir.

RE-DIRECT EXAMINATION

By Mr. Fogwell:

Q. You interviewed Dr. Litman and Mr. Brahin in late 1955, I take it, is that right?

A. Yes, sir.

Q. And pursuant to what Mr. Schwartz asked you they told you they finally found some records in 1955, is that correct?

A. That is right.

Q. Did they tell you when they started to look for those records?

(42) A. As I recall they started to look for those records they said around 1954, they started to find some of these records, started to look for them December, 1954.

Q. Did you discuss with Dr. Litman as to whether he had been interviewed or not by agents with reference to the previous years filings?

A. Yes, sir, I did.

Q. What did he tell you, in brief?

A. I asked him and he told me he had been examined before, and I asked the doctor why he did not tell the agents he had not filed his Income Tax Returns yet, and he said he didn't bother to tell them.

Q. Did he tell you why?

A. He didn't give any reason.

Q. Did you examine the doctor's records at the hospital?

A. Yes, we did, and at Mr. Brahin's office also.

Q. What records, very briefly, did you find?

A. They had cash receipt books for the years 1952, 1953 and 1954, and they also presented us with a cash disbursement book for the years 1952, 1953 and 1954, and cancelled checks for the years 1952, 1953 and 1954, together with bank statements.

Q. Any other records?

(43) A. Then later on the doctor did show us other records which he said represented his personal income, however, they were not complete.

Q. Did you find any other records?

A. No. That is all.

Q. I think in answer to one of the questions Mr. Schwartz asked you, you said something about it was some months after the letter Dr. Litman wrote the Director of Internal Revenue on June 6, 1955 before you went to see him in the fall of 1955, is that right?

A. That is right.

Q. Then I think you started to go farther with it and you stopped or Mr. Schwartz asked you another question. Did you want to add something to your answer?

Mr. Schwartz: I object to that.

The Court: He may complete his answer if he had anything to add.

A. Well, I wrote Dr. Litman a letter on May 23, 1955 advising there was no record of his filing Income Tax Returns for the years 1952, 1953 and 1954. On May 31, 1955 I received a telephone call from Charles Brahin, who said he was Dr. Litman's accountant, and that the doctor had not filed Income Tax Returns for the years 1952, 1953 and 1954, because his son was sick, because the doctor was sick, and because he had (44) had a dishonest bookkeeper and after the bookkeeper left they were unable to find the records.

Q. You say it was May 23, 1955 when you first wrote the doctor concerning his filing of returns for the calendar years 1952, '53 and '54?

A. That's right, sir.

Q. Is that the first thing that concerned itself with the Service's investigation of Dr. Litman's filings for those three years, if you know?

A. Well, I did prior to this time check the files of our office to determine if Dr. Litman had filed a return.

Q. Was this the first contact the Service made with the doctor for those three years?

A. That is right.

Q. That letter was May 23, 1955 and was the doctor's letter which Mr. Schwartz asked you to produce, and which you did produce dated June 6, 1955, in answer to your letter of May 23, 1955?

A. Yes, sir, it was.

Q. After that exchange of letters then it was in the fall of the year when you first made personal contact?

A. That is right.

Mr. Schwartz: That was December 15, not the fall.

The Court: That is right. Any further questions?

(45) Mr. Fogwell: That is all, sir.

The Court: Any recross?

Mr. Schwartz: Yes, sir.

RE-CROSS-EXAMINATION

By Mr. Schwartz:

Q. Mr. Lynn, you say the doctor told you some agents had been to see him with respect to prior years' returns, is that right?

A. Yes, sir.

Q. You don't mean to imply they came to see him about his failure to file prior years' returns, do you?

A. I didn't say that. I said in regard to examination of his returns.

Q. That means to examine the figures in his returns to determine if any more income tax was due from him?

A. That is right.

Q. That is what you had in mind?

A. That's right.

Q. When an agent examines a return for any year as a matter of practice don't they have their conversations with the accountants?

A. Certainly they have conversations with the accountants and also the taxpayer.

Q. Do you know what was involved in these returns for (46) prior years, was it for additional income, if any?

A. Well, as a result of these examinations there was some additional taxes.

Q. Based on depreciation?

A. I don't know.

Q. Suppose it was based on depreciation, who would the agent discuss that with, Dr. Litman or the accountant?

A. He could discuss it with either one.

Q. When an agent comes in to examine a return for

1950, as a matter of practice is the agent interested in any other year?

A. He usually has the return assigned to him and has that under examination.

Q. And he is not interested in any other year, isn't that true?

A. It depends on what he finds, I suppose.

Q. I am assuming he finds no fraud and is not making any special examination as you made, but comes to examine the return for 1950, does he care about any other year?

A. The way you put it, no, sir.

Q. Is there any reason for Dr. Litman or Mr. Brahin to discuss with him the years 1952, 1953 and 1954?

A. They were having a problem at the time, the doctor had not filed his returns, and if he wanted to know what to (47) do about it he could have discussed it with the agent.

Q. If it was you personally then you would have discussed it with the revenue agent?

A. If I didn't know what to do.

Q. That is what you would have done, is it correct to take it that way?

A. I would have.

Q. If you were an accountant and a revenue agent was examining the returns for 1949 and 1950 would you say to the revenue agent: "I don't know what to do," is that what you would say?

A. If I didn't know I would ask him what to do.

Mr. Schwartz: Thank you very much.

(Witness excused.)

The Court: I am going to adjourn now. Ladies and Gentlemen of the Jury do not discuss the case among yourselves, but wait until you hear all of it before you undertake to decide it, and particularly do not discuss it with anyone else or permit anyone to discuss it with you. You may adjourn court for the day.

(Thereupon, at four o'clock, p. m., the court was adjourned until tomorrow morning.)

(48) The court was reconvened on December 4, 1956, at ten o'clock, a. m., pursuant to adjournment.

Same parties present as heretofore noted.

The following motion was made at Bar:

Mr. Schwartz: Your Honor, this is a motion to withdraw a juror. In the Evening Bulletin, published for Monday, December 3, 1956, which is a newspaper that has a very wide circulation in the City of Philadelphia, there appeared a report on the trial of this case on page three of the newspaper. I herewith offer in evidence, as a part of my motion, a copy of this article. Appearing in this article is a reference to a proceeding in the County Courts, in which it is stated that "In June Dr. Litman was found guilty in the County Court of obtaining money under false pretenses from the Blue Shield by certifying that he personally provided operations for subscribers, when actually they were performed by chiropractors. In August the Court took under consideration his appeal for arrested judgment. In that case the jury brought in a verdict and a motion was filed on the ground the Commonwealth had made out no case, and the motion has not yet been disposed of."

My motion is for the withdrawal of a juror, based on the ground this article prejudices the defendant in this case, as it has no doubt been read by at least some of the (49) jurors and will prejudice the jury from a fair consideration of the evidence in this case, and the defendant is, therefore, not able to obtain a fair trial as the result of this publication.

The Court: What has the Government to say?

Mr. Fogwell: Judge, this has come up I am sure many times before your Honor, and with regularity in

this Courthouse, and I am sure it is a familiar topic to you. It came up, to the best of my knowledge recently before Judge Register in the case of United States v. Alker, which was a trial I had this summer, and his decision in that I think is most appropriate. He says one has to bear in mind the jury is sworn to decide the case on the evidence presented to them before your Honor, and there is no reason to believe they would disregard that evidence. If your Honor would care to, or Mr. Schwartz would want you to, we would welcome an admonition to them. However, that would only highlight it.

The Court: I am going to do more than that, I am going to make some inquiries of them.

Ladies and Gentlemen of the Jury, it has just been called to my attention that in the issue of the Evening Bulletin on Monday, yesterday afternoon, there is a news item or story about this trial, on page three of the newspaper, entitled "Dr. Litman tried, etc." Did any of you read that (50) article? I don't mean to be facetious but I have read many times the advertising slogan "Nearly Everybody Reads the Bulletin".

A Juror: If you have time.

The Court: I am most serious about this, Ladies and Gentlemen. Do I understand no one read this article in the Bulletin?

A Juror: I don't recall seeing it in the edition I had. I read the Bulletin last evening but I don't remember seeing any reference to this trial in there. There was reference to other trials but none as to this case. The editions vary.

A Juror: For the same reason suggested by this lady I did not read it, because I did not have time. I did not see the paper at all.

The Court: Upon the assurance of all members of

the jury that they did not read the article it could not be prejudicial to the defendant.

Mr. Schwartz: With the assurance of the jury then your Honor, I withdraw my motion.

The Court: While we are on the subject, I think it most likely, Ladies and Gentlemen, that we will conclude this case before another newspaper comes out, but I charge you very strictly not to read anything about this trial. Of (51) course it was in yesterday afternoon's Bulletin, but during any intermission or recess or anything else we have, I charge you very strictly not to read the article if any appears.

The Government may proceed.

Mr. Fogwell: The Government would move for the introduction of all its exhibits. I think your Honor admitted them all, but in case I overlooked anything, I now move to admit them all, and with that we rest.

The Court: Any objection to that?

Mr. Schwartz: No, sir.

The Court: I think I said yesterday they might be admitted, and I don't recall any objection.

Mr. Schwartz: There is no objection.

The Court: All right, all exhibits may be introduced in evidence.

(The exhibits had previously been received in evidence, on page 23.)

Mr. Schwartz: Your Honor, I move a judgment of acquittal be entered.

The Court: I assume the Government opposes the motion?

Mr. Fogwell: Yes, sir.

(Written motion was handed to the Court by Mr. Schwartz.)

(52) The Court: I will overrule the motion and exception may be noted. The defendant may proceed if he wishes to introduce evidence.

THEREUPON, the following evidence was introduced on behalf of the defendant:

CHARLES BRAHIN, the next witness, called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Schwartz:

Q. Mr. Brahin, what is your occupation?
A. Public Accountant.
Q. How long have you been engaged in that work?
A. Approximately twenty years.
Q. When did you first begin representing Dr. Litman?
A. In 1949.
Q. You filed his Income Tax Return for 1948?
A. Yes, I filed his Return for 1948.
Q. Did you prepare his Tax Return for 1949 and file it?
A. Yes, sir.
Q. Did you prepare it and file it for 1950?
A. Yes, sir.
Q. And 1951?
(53) A. Yes, sir.

Q. What, if anything, did you do with respect to the 1952 Tax Return?

A. The records, when I got in touch, in December 1953 or 1952, Dr. Litman at that time was sick, and in January, 1953 I got in touch with Dr. Litman and he was not at the hospital, but he was at his home, and that was at the time his son was very sick, a matter of life and death from what I was told, and what I found out at a later date. I got in touch with the girls to see what was being done, and the books were not finished or complete and the girls were working on them.

Q. Did Dr. Litman ask you to file his Income Tax Return for 1952?

A. Yes, sir.

Q. Did he ask you to file his Return for 1953?

A. Yes, sir.

Q. Did he ask you to file his Return for 1954?

A. Yes, sir.

Q. There is evidence several extensions of time were requested for filing his Return in 1952; is that correct?

A. Yes, sir.

Q. Whose decision was it to ask for those extensions?

A. I discussed it with the Doctor and told him he (54) would have to get extensions, and the Government granted the extensions. When I asked for the extensions I used the same form letter asking for the time, because I couldn't get the records. If I had known it would be a sort of criminal offer , I would then have stated in there the records were not available, and they were lost or misplaced.

Q. Whose decision was it to ask for the extensions in 1953?

A. It was my decision for the same reason.

Q. Whose decision was it to ask for the extensions in 1954?

A. It was my decision in the same way.

Q. Did the Doctor ever tell you he did not intend to file a return for any of those years?

A. Never.

Q. Did he ever suggest no return be filed for those years?

A. No, sir.

Q. Was it your understanding you were to file a return for each of those years?

A. Yes, sir.

Q. And you managed the filing or the non-filing of them, whichever occurred?

A. I don't understand.

(55) Q. I will put it this way, you decided whether his

records were in shape so you could file a complete return for 1952; is that right?

A. That is right.

Q. And you decided whether you could file a complete return for 1953?

A. That's right.

Q. You decided whether the records were in such condition you could file a complete return for 1954?

A. Correct.

Q. Dr. Litman had records of cash receipts, did he?

A. There were records written of cash receipts but never extended across as to what the income was.

Q. In other words, the cash receipt records showed all the receipts for 1952 but didn't show the sources?

A. They didn't show what they came from, whether his personal loans or whether he received money from mortgages, or whatever other income he had.

Q. In other words, the cash receipt book which showed a total of the cash receipts, did not show how much was attributable to income and how much might be a duplication of loans and etc.?

A. That is right.

Q. Or how much was from income sources?

(56) A. That is correct.

Q. And to that extent it was not complete?

A. That is right.

Q. Now the cash disbursement book for 1952, was there one made up for that year?

A. There was one written up that was not complete. It was not extended, etc., and I asked the Doctor to have somebody get these records complete.

Q. The cash disbursement book is made up from payments that are made by the doctor in the course of the conduct of his business?

A. The receipt book?

Q. No, the cash disbursement book.

A. The cash disbursement book is made up from checks

issued which come from the check book. The stubs, the information on the stubs of the check book.

Q. So we may understand what you mean by cash disbursement record, when a check is issued for a particular item, let us say medical supplies, that check is entered on the cash disbursement book under the column "Medical Supplies", is that right?

A. That is right, in a double entry book.

Q. The cash is entered under "Cash" and the cash is charged to whatever it is?

(57) A. Yes, sir, and I have to make sure whether it is a business or personal expense.

Q. The cash disbursement records are usually made up by clerks and bookkeepers, are they?

A. That is right.

Q. Do you make the cash disbursement records?

A. No, sir.

Q. So when the 1952 return became due, what was your principal problem?

A. The principal problem was to get complete records in order to file a proper return.

Q. What do you mean by complete records?

A. I must have all the entries or cancelled checks to check out and see if all checks have been recorded, and I check it with the bank statement, and must make sure the bank statements show the deposits received and check all the checks listed in the cash book to see if they are extended to the proper account, in order to get proper information to file a return.

Q. For the year 1952 I understood you to say you had an incomplete cash receipt book record and incomplete cash disbursement record; is that correct?

A. That is right.

Q. During the year 1953 when the 1952 return was due, (58) what, if anything, was done at the doctor's hospital to make up a cash receipt book and cash disbursement book?

A. He had help there who to me were incompetent help, and they never completed it properly.

Q. Did you instruct them?

A. Every time I found a new worker there I did, and let me state in 1952 he had approximately I would say about seven or eight people, who were doing the books at various times.

Q. In 1953 or 1952?

A. 1952, and in 1953 he had approximately seven or so, and the books were never complete. Every time I saw a new bookkeeper there I would ask her if she understood and explain to her how it was to be done, and how it was easy to follow it out, but they never did it.

Q. When you say seven or eight bookkeepers, you don't mean at one time, do you?

A. No, sir, that was during the year.

Q. You mean different one working on the books?

A. Correct.

Q. So in 1953 you gave instructions to seven or eight different girls on how to do it?

A. Correct.

Q. At the end of 1953 was the cash disbursement book (59) properly drawn up for 1952?

A. At the end of 1953—it was sometime in 1953 they were writing up the books but it wasn't complete at the end of 1953. Sometime in September, 1953 I spoke to the Doctor and told him we would have to get somebody to do these books, and at that time I believe he got a gentleman by the name of Kruger, and this gentleman, I came in and I saw him in October, and I saw the way he was working the books up, and I knew he had a man who knew how to write the books up. I understood he was a C.P.A.

Q. How long did he work on the books or how long did he work for Dr. Litman?

A. In October, 1954 when I stopped around there Kruger was not there any more, and I asked for the records and the records given to me were not altogether, there were

months missing of the cash disbursements for 1952 and for 1953. Then I asked Dr. Litman what happened to his records, and I said, "they must be around here somewhere," and in his office we went through the cabinets looking for sheets that were part of the cash disbursements, and I could not find them there, and I told him, "You better look for them, they must be around here," and I came back periodically during the year looking for these things, and there is a room in the basement used for narcotics, etc., and for records.

(60) Q. You say you came around periodically during 1954?

A. Yes, sir.

Q. When you say periodically you mean (interrupted).

A. That was after the tax season.

Q. When you say periodically what do you mean?

A. I would come in a day or two during the month, and sometimes I stopped at nighttime, around five-thirty or six o'clock from my office on my way home, and I would look for the records and spend maybe an hour or half an hour looking for them.

Q. Did you look for the records in 1955?

A. Yes, sir, 1955 is when I found them.

Q. When did you find them?

A. Approximately, I believe it was in May, I found the missing several months of cancelled checks and bank statements missing, and several months of the cash disbursements missing.

Q. When you came there in January, 1954 you said there were some pages from the cash disbursement book missing.

A. I mean by months, some months were missing.

Q. For the year 1953?

A. Yes, sir.

Q. How about 1952?

A. 1952 were missing too, part of them.

(61) Q. And how about the cancelled checks?

A. The cancelled checks were missing for several months also.

Q. How about the check stubs or books?

A. This is what was missing, part of the cash disbursement book, cancelled checks and bank statements and stubs, completed check books, the stubs of these were missing, and if I didn't have check book stubs I couldn't write it up because they had the necessary information. If we had the cancelled checks we could compile it from the cancelled checks but we didn't have them.

Q. When you found the records will you tell us where you found them; first of all, who found them, you or Dr. Litman?

A. I found them.

Q. Where did you find them?

A. I found them among the medical records, after looking through the place and one closet and another closet, I looked through cartons and in these cartons were office records, and I couldn't find the cancelled checks or the loose bank statements or cash disbursement sheets that were missing. I couldn't understand why they wasn't there, and I kept looking and thought they must be somewhere in the place and it dawned on me it might be they were in the medical (62) cases or records, with jackets on them, and I found sheets laying among them, and I would say maybe over a thousand folders laying in there in these various cartons, and in these cartons between the folders I found sheets and how they got there I don't know.

Q. Now, Mr. Brahin, the cash book, cash disbursement book, and the cash receipt book we talked about, is it in the form of a book or pages?

A. They are loose leaf sheets in a binder.

Q. Somewhat of this character, which I now show you?

A. Yes, sir.

Q. That sheet is I judge 8-½ x 11, isn't it?

A. Yes, sir.

Q. When you said months of the records were missing do I understand you to mean that several sheets represent a month?

A. Yes, sir, several sheets represent a month and they were missing.

Q. The medical records you described in jackets, I believe they are folders?

A. Yes, with printing on some and some blank.

Q. And in the folders were (interrupted).

A. Not in the folders but between the folders.

Q. I mean in the folders was information with reference (63) to cases?

A. That is right.

Q. By cases we mean hospital or medical cases?

A. That is right.

Q. Those folders or medical records you say were kept in cartons?

A. They must have removed them from the place and put them in the cartons.

Q. How many folders would you say there were?

A. Like I said before I never took a guess but I would say over a thousand or so in the cartons.

Q. When you found these pages where were they?

A. Some were laid on top and some on the side, like somebody just piled them into the carton.

Q. You are talking about these pages?

A. Those were among the folders is where we found them.

Q. In order to find them what did you have to do?

A. I went wading through all the rest of that stuff and at the bottom I found some cancelled checks.

Q. What did you have to do to find these sheets?

A. I was looking at the folders and in the folders and looking for any sheets in there and I found them laying between the folders.

Q. Did you find all the missing sheets together?

(64) A. No, no, they were spread out and I can't explain how they got that way.

Q. Now did you find all the sheets together among these medical records once you located them?

A. Not altogther, they were in different sections of the cartons. There were several cartons.

Q. In how many places were those cartons located?

A. There is one closet as you come down and you make a complete turn and you have a closet in the corner there. That was where he had records and diagonally opposite that office or clinic another closet which is longer, and that is where I found most of them, and then a closet opposite the kitchens, cartons in there, and I found cartons in there and parts of statements in them, and I found some in a storage room next door at that time.

Q. Do I understand you found these medical records in cartons in three separate places?

A. Yes, sir, they were moved around and I found some in this closet and some in the other closet.

Q. And you had to go through these medical records to find these sheets?

A. That is right.

Q. Did you have any idea they were there?

A. No, and I can't yet figure out how they got there.

(65) Q. You say there were some cancelled checks and the check stubs were missing too?

A. Yes, sir.

Q. Who found them?

A. I found them.

Q. When did you find them?

A. Well, the last batch I found would be approximately in May, I don't know the exact date, but sometime in May, 1955.

Q. Where did you find them?

A. In the cartons in one of the closets.

Q. Where were they with relation to the medical records?

A. They were laying among the medical records. You would find statements laying in the bottom of the carton and cash disbursement sheets laying between the folders, and it looked like somebody put them there maliciously, but

I don't know, and I can't explain but that is where I found them.

Q. After you found the records, the cancelled checks and check stubs, what did you do about preparing an Income Tax Return for the doctor?

A. Then it became my business to see whatever was not finished was completed, and what wasn't extended we took time to dig it out to find out what the ones not extended represented or we got the cancelled checks, and we had someone (66) finish the balance of 1953. In September one of the office girls in another office I audit had told me her sister was looking for part-time work in the evening, and I got in touch with her and she said she would take care of them, and I had this girl, I took the records to her place, meaning the check stub book, the cancelled checks and sheets, and brought her over the sheets, and showed her the lay-out and she completed the balance of 1953 and the whole year of 1954, and also took care of 1955 for me, and then when those things were put together and they were added up and checked across, and we take the bank statements and start checking down each figure and each check issued to make sure the checks were issued and cancelled, and checked to see what they were charged to, and what they ought to be charged to, and we get our expenses together and get our total income and check it with the bank statements, and the deposits to arrive at the doctor's income. All his income was not from the hospital but income from his hospital and personal practice and we get his figures together that we make the Tax Return from.

Q. When the extension of time had expired for the year 1952, that is September 15, was the last day on which you had received an extension of time for the 1952 return, wasn't it?

A. It states "final" on it.

(67) Q. Did you talk to the Doctor about your inability to file a return at that time?

A. I don't understand.

Q. Did you talk to the Doctor about your inability to file a return for him at that time?

A. Yes, sir, I explained it to him and told him it would cost him five percent penalty and interest, ½ percent a month.

Q. Did you ever tell him it was a criminal offense not to file a timely return?

A. No, sir, because I didn't know it was a criminal offense.

Q. Now as a matter of fact, Mr. Brahin, in 1953 you could have made up a cash disbursement book, if it was your policy as an accountant to make them up, from the records of Dr. Lipman, couldn't you?

A. We didn't have records to make them up. How could I make them up?

Q. I am talking about 1953 when the return for 1952 was due.

A. I don't understand.

Q. In March or June or July, 1953 the doctor's cancelled checks were still around, weren't they?

A. In 1953?

(68) Q. Yes.

A. I believe so.

Q. And the doctor's stub book was still around?

A. I didn't look at that time so I couldn't state, I don't know.

Q. If they were you could have made up a cash disbursement book?

A. But I don't do bookkeeping.

Q. Are you in position to make up a cash disbursement book?

A. No, sir, I have other clients, and it would take too long. I don't have time to do that kind of work.

Q. Is it normal for accountants to do bookkeeping?

A. No, sir.

Q. Now in 1953 I believe you told me, but I don't re-

member how many girls he had at different times doing the so-called bookkeeping. How many did he have?

A. I believe approximately seven or eight, I am not sure. That is the girls in the office taking care of the office records.

Q. Whom you instructed as to how to do this work?

A. Every time I came there I saw a new girl.

Q. And in 1954 how many girls were there?

A. I would say approximately the same, I don't know (69) exactly, five or six.

Q. And in 1955?

A. About five or six.

Q. Now you finally engaged a young woman to do the work on a part-time basis, did you not?

A. Yes, sir.

Q. That engagement was when, Mr. Brahin?

A. If I recall correctly sometime I think in September, 1955.

Q. Was this girl an experienced bookkeeper?

A. Oh, yes.

Q. Is there any reason why you didn't employ an experienced bookkeeper on a part-time basis before that?

A. I didn't know of any. This was an office girl in another office I audit who asked me if I could get work for a girl who wanted part-time work, is how I got in touch with this party, a Mrs. Sanders.

Q. In your experience in that field was it a simple matter to obtain that kind of service?

A. Part-time service it is not easy to get, it is usually by recommendation and someone who knows someone, you ask people is the only way I get them.

Q. Did the doctor ever talk to you about filing a return even if it was not complete?

(70) A. Yes, sir, and I told him it must be correct, and absolutely correct, and I would not file for no one any false return, and he didn't ask me to file a false return, but said,

"Can't we file a return from whatever records we have got?" And I told him "they are not complete."

Q. By the term "correct" what do you mean?

A. Of the actual transactions that come in and the actual income that comes in.

Q. In other words, you want to be in position to verify all the receipts and disbursements?

A. Yes, sir.

Q. When did you first speak to Mr. Lynn, who testified here yesterday?

A. I think that was after I spoke to Mr. Lynn, I believe after Dr. Litman was in touch with me, after he received a letter from Mr. Lynn as to his 1952, 1953 and 1954 returns.

Q. How long did you work on those returns?

A. Well, I have worked evenings adding them up and checking the bank statements. I would say approximately ten weeks to take care of the three years.

Q. Was there any other agent who was assigned to this matter beside Mr. Lynn?

A. Mr. Lynn came in with a Mr. Golato, an agent of (71) the Internal Revenue Department, and they checked over the records the same as I checked over them.

Q. When did you meet with Mr. Golato?

A. I believe it was in January, 1956.

Q. Now in January, 1956 were your work papers complete so you could file a return for the doctor?

A. Not one hundred percent complete, no, sir, and when they came in naturally I was working with the records. We were working together, we were checking out together and we compared together.

Q. When you say "we" you mean who?

A. I mean Mr. Lynn and Mr. Golato, they worked in my office on it.

Q. How long did Mr. Golato work in your office?

A. I would say several weeks but the first week or two they were there almost every day. They would come in at certain times or expect to and then couldn't come in that

day and would come in the afternoon and couldn't come in the morning, and afterward they came back periodically because nothing else they were tied up with and couldn't come back, and I was finishing my work too and trying to tie everything up, and we had many discussions in making up my report and going over different things.

Q. Finally when you prepared the returns did Mr. Golato (72) know the items that were entered on the returns?

A. Yes, sir, when I prepared the returns, when I prepared the three years, I delivered them to Mr. Golato in the Internal Revenue Office.

Q. Before you delivered the returns to Mr. Golato, did you show Mr. Golato what you were putting in the returns?

A. We went over our reports and the actual facts I put them in, and he examined my other papers, and we checked out together.

Q. Did Mr. Golato indicate your conclusions which you were putting into the returns were the same as his?

A. That I don't know.

Q. Did he take exception to any item in your work sheets?

A. He didn't state anything after I turned over the returns to him.

Q. I mean before that?

A. Before we argued about different items, what they were, and whether they should be or should not be, and we checked out.

Q. In other words, you agreed on all items of receipts and disbursements with Mr. Golato?

A. I believe so.

Q. Not what you believe, but did Mr. Golato talk to (73) you about it?

A. We checked things out together and he said "you turn your returns in," and that is all, he didn't say they were correct or not correct.

Q. When did anybody indicate to you at any time that

it might be a criminal offense if an Income Tax Return was not filed on time?

Mr. Fogwell: Ignorance of the law is no excuse, and we object to this question.

The Court: That is true generally, but I overrule the objection.

Q. Did you understand my question?

A. No, sir, I didn't.

Q. When did anybody tell you for the first time that the failure to file a timely return might be a criminal offense?

A. We had a discussion, Mr. Lynn and I, in the office, in my office, and I happened to mention the fact that the doctor being late in filing there was no intent on his part not to file a return, but his intent was to file a return, and never any thought of not filing, and Mr. Lynn said, "Don't you read the newspapers and see what they are doing to people not filing returns?" And that was the first time I realized that not filing a return on time was a criminal offense. (74) I was under the impression it was a penalty of five percent a month, limited to five months, and one-half percent a month interest.

Q. The penalties you are talking about are civil penalties, that five percent?

A. That would be civil penalties, yes, sir.

Q. After you learned that it might be a criminal offense if a timely return wasn't filed, which I assume was December, 1955 or January, 1956, is that right?

A. It was in February when I realized it was that type.

Q. Did Dr. Litman see a lawyer in the matter to protect himself in any way?

A. Not at that time. After the audit was completed and Dr. Litman and I cooperated one hundred percent with Mr. Golato and Mr. Lynn and we made our statements to them, and Mr. Lynn at the time we were making the statements he said, "this turn-over of help is very good, it is a big help to you, doctor, etc.," and we had no thought of any criminal

offense whatsoever in the whole matter, and the doctor never had any idea of it, because I know the sickness of his child, etc., when his child was almost dying, it is hard for anyone to realize it unless they are in that position.

Mr. Schwartz: Cross examine.

(75) CROSS-EXAMINATION

By Mr. Fogwell:

Q. Mr. Brahin, you say you have been Dr. Litman's accountant since 1949?

A. Yes, sir.

Q. And you are still employed by Dr. Litman, is that right?

A. Yes, sir.

Q. Mr. Brahin, actually ultimately, after the diligent search you told the jury about, all the records were found and returns filed, were they not?

A. That is right.

Q. And actually the diligent search you commenced, you didn't commence it until late in 1955, did you?

A. Oh, no. I looked for them in 1954.

Q. When in 1954?

A. Oh, approximately January, 1954, when I came in there to get the records so I can get the 1952 and 1953 in.

Q. Let's take our minds back, if we may. Now the 1952 return, which is the first one the doctor is charged with not filing as prescribed by law, was due in March, 1953; is that right, sir?

A. That is the due date, but of course there were extensions.

(76) Q. Then you got extensions from March, 1953 to September, 1953 for the 1952 return?

A. Correct.

Q. Actually you had three extensions, did you not, sir?

A. Yes, sir.

Q. You were here yesterday in court, were you not?

A. Yes, sir.

Q. You saw the letters or heard them read which we put in evidence wherein you had asked for certain extensions?

A. Yes, sir.

Q. I want to show those to you again, if I may. The first one is dated March 14, 1953, which is one of a series of three letters. Is that your signature?

A. Yes, sir.

Q. In that letter you asked for an extension to file Dr. Litman's return for ninety days; is that correct?

A. Yes, sir.

Q. And they gave you from March 15th to June 15th, is that right, sir?

A. Yes, sir.

Q. And in that you recited the reason you had an excess of work on hand, is that right?

A. That's right.

Q. And when that ninety days had nearly run out you (77) asked for another extension and this time the Doctor signed it; is that right?

A. Yes, sir.

Q. And in that one you said something about excess work?

A. Yes, sir.

Q. And the third and last one that concerned the calendar year 1952 you wrote on August 13, 1953, and asked for an extension of another thirty days until September 15, is that right, sir?

A. Correct.

Q. And in that one you recited illness of yourself?

A. Yes, sir.

Q. Actually you were not ill, were you?

A. Yes, sir, I am and I was.

Q. What medical problem were you suffering from?

A. I became very ill and weak and exhausted from work, and they gave me medicines that didn't help me, and

finally I had been taking vitamins to pep me up when I got exhausted, and you get exhausted in doing this type of work.

Q. Did Dr. Litman treat you for this illness?

A. No, sir.

Q. In the last extension you asked for a thirty day extension, whereas in the first one you asked for ninety days. Why did you ask for only thirty days in the last request?

(78) A. Because I believed they would be able to get the records together and find them and complete them on time, and when I ask for an extension I use this, for illness when I am ill, but when I am over-worked it is standard, and if I knew it would be called a criminal offense I would have written in there the books were not available or they wasn't complete.

Q. I don't mean to press you unduly, Mr. Brahin, but my question is, on August 13th when you asked for a third and last extension for filing Dr. Litman's 1952 return, you asked for a thirty day extension, and my question is why didn't you ask for ninety days?

A. Because thirty days was all they would permit.

Q. Who would permit?

A. The Internal Revenue Department, they only allow you six months.

Q. Upon what do you rely for that statement?

A. Because Uncle Sam only allows you a six months extension.

Q. So at the time you wrote that letter you knew that?

A. Yes, sir, it is six months.

Q. I suppose you do a sizable amount of Income Tax work?

A. I only do my own clients. I don't handle individuals (79) unless they are employed by a client of mine.

Q. You do have a sizable practice?

A. Very sizable.

Q. You do handle tax work for them?

A. Yes, sir.

Q. So you do regularly familiarize yourself to protect

your clients with the rules and regulations concerning Income Tax work?

A. Yes, sir.

Q. So as a good accountant you say you were familiar with the regulations and statutes which prevent the Revenue Department granting more than a six months extension?

A. Correct.

Q. Tell the jury, if you will, where you did your basic work in accounting, are you a certified public accountant?

A. No, sir.

Q. Did you study to prepare yourself for that?

A. Yes, sir.

Q. Where did you study?

A. At the Wharton School, University of Pennsylvania, at night. That was the night school.

Q. So you went to what is called the Evening Extension School of the Wharton School of Commerce here in Philadelphia?

A. Yes, sir.

(80) Q. When did you go there, sir?

A. 1922, no, 1927 and 1928.

Q. And you have been a public accountant for how long, sir?

A. Approximately twenty years.

Q. And I suppose you keep yourself abreast of the various accounting changes and regulations of the Department of Revenue?

A. Yes, sir, I have to know what the regulations are. But I don't handle, very seldom do I handle anything that runs beyond the extension period, and I am not familiar with it, but I am familiar with if it is late it will cost you a twenty-five percent penalty if you don't file it by the end of six months, and you lose the exemption from paying penalty and you have to pay a penalty, and I never had anything whereby it would be any criminal offense involved, and I am not familiar with someone that doesn't file for several years, and this was a new thing to me.

Q. You say you were familiar with the requirements of the Internal Revenue Department?

A. I am.

Q. What you are saying is that as a good accountant you were familiar with the rules and regulations, and so on, concerning revenue, income revenue, etc., and you knew about the (81) ninety day or six months requirement, and no extension beyond that, and yet you tell the jury you didn't know the other rule or regulation, or part of the Code, which says Congress has made it a crime not to file an Income Tax Return on time?

A. I have had where someone had not filed a return.

Q. Will you answer my question, please?

A. I never knew it was. I am trying to explain it. I did not know there was any criminal offense if you did not file on time.

Q. What you are telling the jury, not to press you unduly, is you knew the Code well and had studied at the University of Pennsylvania, and the only thing you didn't know was that Congress made it a criminal offense not to file on time?

A. The Code has many regulations and we don't all know the Code that well.

Q. Now, sir, to move along hastily, in 1954 you requested extensions again for Dr. Litman, did you not?

A. I did, yes, sir.

Q. I show you letter you wrote the Director of Internal Revenue on March 13, 1954, in which you requested a sixty day extension and recited the fact you were overburdened with work (interrupted).

A. Which was true.

(82) Q. And another letter dated June 14, 1954 requesting a further extension, in which you recited you were overburdened with work?

A. Yes, sir.

Q. And a third letter dated August 13, 1954 in which you say you were ill and over-burdened with work, and you

got an extension again pursuant to the six months maximum only to September 15th, is that right?

A. That is true.

Q. Now when you wrote this letter August 13, 1954 were you in fact ill?

A. Yes, sir. When I wrote I was ill I wasn't feeling well. I was ill, because I didn't write them that with every one, and if I wasn't I wouldn't write I was.

Q. When you got or wrote for the third extension and now tell the jury you were ill in 1954, was Dr. Litman treating you for this illness?

A. Dr. Litman never treated me.

Q. Was any doctor treating you for this illness?

A. It may be Dr. Schatz w s. I went to him. He was my doctor.

Q. What is his address?

A. Olney and Ogontz. Dr. Lewis Schatz is now deceased and now Dr. David Schatz is there.

(83) Q. You don't know if Dr. Schatz did or did not treat you then?

A. I saw Dr. Lewis Schatz and I told him it seemed like I was sometimes like melting away and couldn't hold up sometimes, and he told me it was over-work and said, "You need a rest and you need vitamins," and I don't have the time to rest.

Q. Were you hospitalized during any of these illnesses?

A. No, sir.

Q. You attended to all your regular work?

A. I attended to my work but not the full time I should have put in.

Q. I want to show you the third and last series of requests you wrote in 1955, concerning the 1954 return, and to move hastily, is it correct the first one you wrote was April 15, 1955?

A. Correct.

Q. Actually April 15th was the filing date and you say there you were over-burdened with work, and got a short

extension and then on July 14, 1955 you wrote another letter in which you say you were over-burdened with work; is that right?

A. Correct.

Q. And again on August 15, 1955, as in August, 1954 (84) and August, 1953 you told the Internal Revenue Service you were ill; is that right?

A. That is right.

Q. And again you got a short extension to September 15, and this year you wrote for a fourth extension on September 15, 1955, again reciting both illness and over-work, and you got an extension to the end of the six months statutory period, that is to October, 1955; is that correct?

A. Correct.

Q. So in 1955 you were ill in August and September, is that right?

A. Yes, sir, and at the present time I don't feel good.

Q. Did you have a physician treat you?

A. It is something I have to take a rest for, they can't help me medically, is what Dr. Schatz told me at that time.

Q. Are you willing to tell the jury now, under oath, that you were treated by a physician any of these three years in August, 1953, 1954 and 1955?

A. I was treated I know in 1953.

Q. But you are not sure about the other two years?

A. In the other two years, no, sir, I wasn't treated, but I don't feel good. I still don't feel good. They could not help me in 1953 either.

(85) Q. Now, Mr. Brahin, I think you told the Jury in answer to some questions Mr. Schwartz asked you that generally an accountant secures figures from his client or bookkeeper and he does not do the basic bookkeeping himself?

A. Correct.

Q. And that you, notwithstanding that, wanted to satisfy yourself that there were actual basic correct underlying records; is that right?

A. I don't understand that question.

Q. My question may not have been well phrased. Did I understand you to tell Mr. Schwartz you didn't want to file an incorrect return and, therefore, you personally, when these returns for 1952, 1953 and 1954 were filed in March, 1956 that you personally satisfied yourself that the figures were accurate?

A. From the records I have, yes, sir.

Q. Well, did you examine the base records yourself, or did you merely take the totalized figures from your client?

A. I totaled them and checked them across to see to whom they were charged.

Q. So that you actually did some of the work yourself and satisfied yourself of the accuracy of them, and it was not a question of records furnished to you; is that correct?

A. The records were furnished to me, and we check them (86) across, no matter what records are furnished we check them, and if adjustments have to be made we make the adjusted journal entries.

Q. I call your attention to the 1952 and 1953 returns. In the lower left-hand corner of the 1952 return—is that your signature?

A. Yes, sir.

Q. Over the top of the signature is that your printing that says "From records and information furnished"?

A. Yes, sir.

Q. Is that something you customarily put on returns you prepare if the client furnishes you the material?

A. Yes, sir.

Q. If you dig into it yourself, which takes more time, and justifies a larger accounting fee, then you do not put that on a return, do you?

A. I put that on today. I do that today.

Q. On the 1953 return you wrote the same thing, did you not?

A. And the 1954 too.

Q. Actually I don't see it on the 1954 return, is it on there?

A. That is my error. I may have put it on there. I always do.

(87) Q. Now, Mr. Brahin, take your mind if you can, back to the spring of 1953, when the 1952 return was due. Am I correct that when you got these extensions we have discussed here that you told Dr. Litman "look here, this is a serious thing, and I can get some extensions, but these must be filed?"

A. I told the doctor they must be filed and seeing the records are not complete I will have to get some extensions.

Q. And then you got the extensions?

A. That is right.

Q. Did you converse with the doctor and phone him regularly?

A. I have been in touch with the doctor and him in touch with me.

Q. So actually in 1953, 1954 and 1955, all through those years, you regularly were in touch with the doctor and explained to him the seriousness of it, did you not?

A. Yes, sir.

Q. And that it was an absolute must?

A. That the tax returns must be filed, but I didn't have to explain it to him; he told me they must be filed.

Q. Didn't you constantly press him "now doctor, I know of your problems personally, but this is an absolute must, you have got to get people in there to do it."?

(88) A. That is right, and he was looking for help and the help he got was incompetent.

Q. During 1953, 1954 and 1955?

A. Yes, sir.

Q. You, also, had other clients at the time?

A. Correct.

Q. And I suppose some of them had personal troubles too at the time?

A. No, sir.

Q. Dr. Litman was the only one?

A. He was the only one.

Q. All your other clients over the Philadelphia area had no personal problems?

A. No, sir. They may have other personal problems but not of this type.

Q. Mr. Brahin, as a good accountant, I suppose you do represent a cross section of society, of people who run small businesses of their own, not only doctors, but automobile dealers, lumber yards, and so on, don't you?

A. Most of them are in the building business.

Q. Do you have some clients who in the spring of some years come to you and say, "Look, Mr. Brahin, my records are not so good in certain fields, cash receipts or disbursements, and I have to use some estimates"? Did that ever happen?

(89) A. No, sir, I don't use no estimates.

Q. Suppose you had such a client who was in the building business, and he came to you and said, "Look, Mr. Brahin, I have lost certain records, they were actually burned up in my warehouse," physically destroyed, what would you do in that case?

A. In that case of a fire and an impossibility of recapping those facts you would have to notify Uncle Sam they were burned. In this case they were not burned.

Q. In that case you would write the Government and say honestly they were burned up in a fire and destroyed, and all gone, and then what kind of figures would you use?

A. In that case you would get the permission of the Government to use an estimated figure, but I would try to get permission, before using an estimated figure.

Q. You would use your best estimate then?

A. That is all you could do, but if you have a fire you have it on the Fire Department record and the Police record to prove there was a fire.

Q. Suppose you had a client who said half his warehouse was burned down and some of his records were destroyed, and some up there, wouldn't you tell him, "this is a must, we have to thrash this out, payment of taxes and fil-

ing a return is a serious business, we can't do otherwise, we have to make a (90) full search and lay it before the Revenue Department and tell them what records were burned up and which were not, and use estimates for the ones destroyed"?

A. Yes, sir, there would be no way of recapping these records, or sitting down and corresponding with every individual you did business with, and that would be a long drawn out thing.

Q. My question is this, all through 1953, 1954 and 1955, when you and the doctor were constantly in communication with each other personally and by telephone, why didn't you tell the doctor, "Now look, it is either one or the other, we either have to locate the records within the next week or two, and I don't care if you have to go out and hire three searchers, for we have to write a letter to the Internal Revenue Service that the records are lost, we have to commit ourselves and say they are actually lost and we have to do something, our best estimate, or we have to find them"?

A. If I knew it was a criminal offense not to file them I would have written in the letter the records were lost, but I was under the impression, and always felt we would find the records, which we ultimately did.

Q. When you really got down to looking for them?

A. Not when we got down to look for them, please, Mr. Fogwell, when I looked for them I looked periodically.

(91) Q. Actually you found all the records in the basement of the Wynnefield Hospital, did you not?

A. In the hospital, in the next building.

Q. Actually the building you found the records in is not the big building, is it?

A. No, sir, it is a small building and every space much needed.

Q. Had you done, or had a good housewife at spring cleaning time done as Mrs. Brahin or Mrs. Fogwell would do, and turned the place inside out, you would have found them the first week you looked for them, wouldn't you?

A. No, sir, I wouldn't think of looking among medical records.

Q. But had you turned the place inside out and looked among the medical records you would have found them the first week, would you not?

A. I don't know how long it would take to clean the place up and to take everything out and find them, it might take a week or two.

Q. You told us the Wynnefield Hospital is a relatively small building.

A. Yes, sir, it is very compact.

Q. And you would have looked in every closet?

A. I did and didn't find them, and I took the chance (92) and liberty of looking among the medical records and that is where I found them. I didn't expect to find them there, but if somebody misplaces something they look everywhere.

Q. Now refreshing your recollection of your knowledge of accounting and Income Tax Rules and Regulations you know as a good accountant business men are required to keep books, don't you?

A. Yes, sir.

Q. And also that people who earn over $600.00 a year must file a return?

A. Yes, sir.

Q. And you know also there is a deadline for that return to be in, do you not?

A. Yes, sir, definitely.

Q. Did you tell the doctor when you were conversing with him during 1953, 1954 and 1955, "Look, Doctor, I am an accountant, I can't prepare the base books for you, you have to do that; and you have to do it promptly"?

A. I told him we must find those records and it must be done soon, "otherwise if it is not done on time you will run into a five percent monthly penalty for five months."

Q. Didn't you tell him "you must do the searching, you must hire bookkeepers, I am an accountant"?

A. That is right, he must hire his own help and he (93) tried to get the help and finally got someone to write them up in 1953 in October, and he brought the books up and in 1955 I finally got the girl to complete the records.

Q. That was Mrs. Sanders?

A. Yes, sir.

Q. As you said a minute ago ultimately you found the records?

A. Yes, sir.

Q. And you told Mr. Schwartz on direct examination that at the outset you had lost certain of the following items, checks, ledgers, check books, stubs and cash disbursement books.

A. I didn't say I lost them.

Q. But that they had been lost?

A. Yes, sir.

Q. Actually isn't it a fact the ledgers, duplicates, could have been secured from the bank?

A. But you couldn't get cancelled checks.

Q. Would you focus your mind just on the ledger cards a minute?

A. The ledger cards, yes, sir.

Q. Also, you could have secured photostats from the bank, could you not?

A. Not all banks have those machines. I don't know (94) if they had it at that period or not?

Q. What was the bank the hospital used?

A. Central Penn National Bank.

Q. Right here at Broad and Arch Streets?

A. Yes, sir.

Q. When you found out that certain checks were missing, did you or the doctor go to (interrupted).

A. There were months checks missing, and they run into a file.

Q. When you found out certain checks were missing did you or the doctor go to the bank and say "do you people make recordaks of checks"?

A. No, sir.

Q. For the benefit of the jury w' t is a recordak?

A. It is a picture of the cancell check.

Q. Actually what transpires his, is it not, if I write a check on my bank and I give it someone to pay a bill, and they deposit it in their ban' and it ultimately goes to my bank, my bank takes a pictur of it; is that right?

A. That is right, it is like ilm.

Q. Actually it is about th ize of your thumb, is it not?

A. I don't know the exac size but I know it is small.

Q. So many banks today recordak the checks of their customers, (95) do they not?

A. I know they do today, but I don know about previous years.

Q. So much for ledger cards, and I want to show you, if I may, a series of ledger cards, actually that is the Central Penn National Bank series of cards, is it not?

A. Yes, sir, that is from the batch of statements we gave to Mr. Lynn and he photostated them.

Q. You made those available to Mr. Lynn?

A. Yes, sir. We made everything available.

Q. Did you ever go to the Central Penn Bank and say "some of ours are lost, do you have duplicates"?

A. No, sir, I didn't. I needed the cancelled checks and the cancelled checks ran several hundred a month, and it was very important to have those cancelled checks too.

Q. So much for the ledgers and the checks. Actually if you had found the checks, which you ultimately did, or had gone to the bank and looked through its kodaks, you would never have needed the check book stubs, would you?

A. Not necessarily, no, sir.

Q. Now with reference to the cash disbursement book, it was actually made up from the checks, was it not?

A. From the check book stubs and checked with the cancelled checks.

(96) Q. So as you told us you could have made a cash dis-

bursement book from the checks without the check book stubs, is that right?

A. I could, but the girl would have to make it up.

Q. I mean the bookkeeper, if she was industrious and put her mind on it could have?

A. You would have to have an experienced bookkeeper who knew what she was doing.

Q. So actually what you used was the checks and check book stubs as a journal, didn't you?

A. No, sir, your check book is your original information into a cash disbursement book.

Q. I understand, but you used the checks as a journal did you not, and entered them into a cash disbursement ledger?

A. We used the stubs and checked with the cancelled checks as to the correctness of the disbursements.

Q. Now when you were pressing the doctor all through 1953, 1954 and 1955 that he must get this done and must get bookkeepers, "and you must lay out their work for them" (interrupted).

Mr. Schwartz: I object to the question. He didn't so testify and the question assumes he said to the doctor he must do this and that, and there (97) is no testimony of that kind.

The Court: Better reframe your question.

Q. My recollection is you did press the doctor, did you not?

A. I have been in touch with the office there and talked to the girls and explained to them, and the doctor knew it.

Q. All during 1953, 1954 and 1955, and if you like let's just take 1953, how often were you at the doctor's place of business at the Wynnefield Hospital?

A. I didn't make a chronological history of how often I was there but some months I could have been there three or four times and some months only once, because I couldn't drop everything and go there.

Q. Because you have other clients?

A. That is right, and at times I have gone there in the evening and met the doctor at six or seven o'clock, and I would go there and we would look for the records.

Q. Did you say in 1953 some months you may have been at the hospital three or four times and some only once?

A. Yes, sir.

Q. Would it be fair to say in the course of the year you were at the hospital twenty-five or thirty times, would that be high or low?

(98) A. I would say approximately.

Q. That would be about right?

A. Approximately.

Q. So of the three hundred and sixty-five days of the year you were (interrupted).

A. But don't forget during the tax season I am not there, I can't be there during that time, and I would say during that time less than twenty-five.

Q. Say fifteen to twenty then?

A. Around that.

Q. So of the three hundred and sixty-five days in the year you were at the hospital no more than fifteen or twenty times; is that right?

A. Approximately, yes, sir.

Q. So actually, notwithstanding the fact you were regularly conversing with the doctor on the telephone, etc., you don't know, if anything, he was doing about searching for the books, do you?

A. In 1953 is when his son was very sick, and that is the time when I got to the hospital the doctor wasn't there, because he was at home, subject to call, I believe, because at that time they didn't expect his son to live.

Q. His son got ill in December, 1953, did he not?

A. I think it was the early part of 1953.

(99) Q. I beg your pardon, Mr. Lynn corrects me and says it was December, 1952 when the son was critically ill for a two or three weeks period only, is that right?

A. I don't know. I know he was critically ill and I know when I came there during the early part of 1953 he wasn't there because he was at his home with his child.

Q. May I repeat the question, and to save time I would appreciate it if you would answer directly and then explain. My question is, during the year 1953, which had three hundred and sixty-five days, and you were at the hospital no more than fifteen or twenty days, you have no personal knowledge as to what, if anything, the doctor did with reference to searching personally for the records or directing the search of others, do you?

A. I wasn't there. I don't know if I am not there, I am not a watchman, I can't guarantee any man is doing this or that, I can only take them at their word, and he tells me he has been looking for them and I have been looking for them, and some of the people tell me they were.

Q. But you don't know if he was there?

A. I wasn't there.

Q. I don't mean this to be facetious but do you personally know the doctor never personally looked for them, is that right?

(100) A. I don't know. I can't say.

Q. In 1954 and 1955 would you say you were there fifteen or twenty times also?

A. Yes, sir.

Q. And you don't have any personal knowledge he ever looked for them during those years, do you?

A. Personally no, a man cannot state a man did something if he didn't see it with his own eyes, and I did not see it, and I will not say anything that is not true.

Mr. Schwartz: I want to correct something. The question was asked if he had any knowledge of the doctor searching for records in 1953. There was no reason to because they weren't apparently mislaid until 1954.

The Court: Are you making a motion or objecting? Proceed.

Mr. Fogwell: I will ask the reporter to mark this letter Government's Exhibit No. 8.

(Thereupon, a letter dated May 23, 1955, to Benjamin N. Litman from William F. Lynn, Jr., was marked for identification Exhibit G-8.)

Q. Now, sir, I show you a letter marked Exhibit G-8, dated May 23, 1955, purportedly from Mr. Lynn, the agent sitting next to me, to Dr. Litman. Are you familiar with the (101) original of that letter?

A. I saw the letter.

Q. You saw the original?

A. Yes, sir.

Q. When did you see it first?

A. I saw this letter, Oh, I don't know the exact date, but I remember when he received this letter we sat down and wrote the letter explaining in answer to this letter. When Dr. Litman received this letter he called me and we wrote the letter back to Mr. Lynn in answer to it.

Q. That letter is fairly brief. Will you be good enough to read it to the Ladies and Gentlemen of the Jury?

A. Yes, sir. (Reading)

"An examination of the records maintained at Philadelphia, Pennsylvania, failed to disclose income tax returns filed under the names and address shown above. It is possible that returns were filed and they cannot be located for the reason that the signatures thereon were illegible, or the returns may have been filed from another address than that given above."

"Please answer the questions on the attached sheet and mail to the Chief, Intelligence Division, Post Office Box 1017, Philadelphia, Pa., using the (102) enclosed stamped envelope which requires no postage."

May I have the letter answering this, explaining it?

Mr. Fogwell: You may in a minute, and when I finish Mr. Schwartz may ask anything he desires.

Q. My question to you is, the letter was discussed with you, is that right?

A. Yes, sir.

Q. The attachment which appears on it has what I read-ing, briefly?

A. It just has initials on top, and says "Print Name in Full," and "Present Address," and "Did you file a Federal Income Tax Return for 1952, 1953 and 1954," and some more questions.

Q. Did the doctor or you ever send that back as requested?

A. No, sir, we sent back a letter in answer to his letter.

Q. This letter the doctor received in May, 1955?

A. Yes, sir.

Q. And it concerned the returns for the years 1952, 1953 and 1954, is that right?

A. That's right.

Q. So when this letter was received in May, 1955, the 1952 return was about two years overdue, was it not?

(103) A. Yes, sir, 1952 and 1953 were overdue and 1954 we had an extension on, and in the case of the extension we still couldn't find and get the records together, and in 1954 it wasn't filed and we explained in that letter what it was.

Q. Now, Mr. Brahin, Mrs. Sanders who ultimately brought these books up to date, what she did was to take certain cash and checks and post them to a cash disbursement ledger, wasn't it?

A. She posted them.

Q. How long approximately did Mrs. Sanders work on them?

A. I think approximately a month.

Q. About a month?

A. I am not sure, I think about a month.

Q. Did she work full time a month?

A. No, sir.

Q. What time did she work?

A. She worked in the evening and Saturdays and Sun-

days, and completed them. She was a highly experienced girl.

Q. After you found the records in the fall of 1955 or thereabout, Mrs. Sanders in part time work was able to bring the whole thing up for three years up to date, is that right?

A. She only finished part of 1953 or part of November and December, 1953, if I am correct, in the year 1954.

(104) Q. So prior to Mrs. Sanders entering the picture 1952 was completed?

A. When we found it we finished it. The extensions had to be taken care of and I was also checking on the disbursements.

Q. You told us you prepared Dr. Litman's 1948 Tax Return, and also 1949 and 1950 and 1951 Returns; is that right?

A. Yes, sir.

Q. I want to ask you now, isn't it a fact that Dr. Litman didn't have personnel or help trouble in the years 1948, 1949, 1950 and 1951?

A. I was called in in 1949 and we got an extension and we checked him out and made up his return for him for 1949 in 1949.

The Court: You weren't asked that. Repeat the question.

Q. Would you try to focus your mind on the question, please. My question is: You told us he had personnel trouble and help trouble in preparing the returns for 1952, 1953 and 1954. My question is, he had no help problems in the previous years, 1948, 1949, 1950 and 1951, did he?

A. I believe he had a little trouble. I am not sure. I don't recall back that far.

Q. But nothing monumental?

(105) A. Nothing like he had in 1952.

Q. Mr. Brahin, in answer to one of Mr. Schwartz's

questions I think you said something about Dr. Litman didn't consult an attorney until when did you say?

A. Dr. Litman didn't consult an attorney until he was notified they were bringing a criminal offense against him for late filing.

Q. Dr. Litman didn't consult an attorney until the information which is the basic document in this case was filed in December, 1956?

A. No. It was before you filed that Information Return, is that what you call it, when he was requested I believe to come down to the Legal Division.

Q. Approximately, if you know, when was that?

A. I don't remember the exact date. It was in 1956 but I don't know the date.

Q. Actually, sir, Dr. Litman from 1948 on and perhaps back beyond that had good accounting and legal counsel, did he not?

A. He was taken care of.

Q. He had you as his accountant from 1948 on?

A. From 1949.

Q. To the present date?

A. Yes, sir.

(106) Q. And he had legal counsel too all that time, did he not?

A. I don't know.

Q. You said, I think, you went over some or all of the items in 1952, 1953, 1954. I am going to show you the returns and ask you briefly (interrupted).

Mr. Schwartz: If your Honor please, I object to this line of examination. The witness was asked if Dr. Litman consulted counsel with reference to this tax matter prior to litigation, and he said no, and the fact he had other counsel in other matters has nothing to do with this.

The Court: That may be so but I will permit the question, but no exploration about it.

Mr. Schwartz: We agree Dr. Litman consulted counsel from time to time.

The Court: Ordinarily I take a mid-morning recess earlier than this, but I didn't want to interrupt and apparently you have more questions, so Ladies and Gentlemen of the Jury, let's take a ten minute recess at this time.

(A ten minute recess was thereupon taken at 11:45 o'clock, a. m.)

The Court: Proceed.

(107) Q. (By Mr. Fogwell) Now, Mr. Brahin, I want to put in front of you again the 1952 Income Tax Return, and I call your attention to the white onion skin paper attached, Schedule "C", and I ask you if it isn't a fact the doctor listed an expense item for Legal and Auditing in the amount of $600 for the year 1952?

A. That was an audit expense, I believe, of $500.00 in there, which covered the previous year's work by me, and $100 was legal expense, I believe, and I do not know what it was for.

The Court: I will not permit you to go into that.

Q. I am not going into it. I now show you the 1953 return and ask you the simple question, isn't it a fact there is an item listed "Legal $489.44"?

A. This legal expense has nothing to do with this.

The Court: He just asked you if it appeared on that return?

A. Yes, sir, it appears on there.

The Court: Now you may add anything you desire.

A. I don't recall exactly what that covered.

Q. My next question concerns the 1954 return, on which the doctor listed $1000 as a legal expense.

A. That was a legal expense.

Q. All right, sir. Now do I understand you correctly

(108) that in the 1953 return you did or you didn't analyze the various break-downs and expenditures for the various items?

A. We analyzed these break-downs.

Q. Mr. Brahin, you have been most patient, but I just want to ask you one last question. You didn't at any time, you never told the doctor this, or words to this effect, did you, "Doctor, it is not a crime to fail to file an Income Tax Return"?

A. Never.

Mr. Fogwell: I have no further questions.

The Court: Any redirect?

Mr. Schwartz: Yes, sir.

RE-DIRECT EXAMINATION

By Mr. Schwartz:

Q. Mr. Brahin, you were questioned about a personnel problem at the hospital, were you not?

A. Yes, sir.

Q. Do you know what the difficulty was about the personnel there?

A. Well, I could state it is a small hospital, and a small hospital in competition with big hospitals it is hard for them to get help that is good help. The big hospitals in general will get the better help than the small hospital, and it is a hard thing for them to get good help.

(109) Q. It was suggested you might have gone to the bank when you discovered some of the checks were lost, and some of the check book stubs were lost for the years 1952 and 1953 or mislaid, and you might have gotten from the bank's photostat records copies of the checks. Are you familiar with these photostat records the bank maintains; have you ever looked at them?

A. I haven't looked at them. I know they exist and I have gotten photostatic copies of one or two statements occasionally.

Q. Do you know if they keep in the photostatic records, whether the bank keeps all the transactions of the day on a long photostat roll and in order to find your checks you have to look over all the transactions of the bank?

A. I understand it is like a moving picture film, it is small and whether it is whatever transactions happened in a day I don't know, but it is a small something I understand.

Mr. Schwartz: That is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Schwartz: I would like to put on some character witnesses at this time if your Honor please.

The Court: All right. Proceed.

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(110) MORRIS I. KURTZ, the next witness, called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Schwartz:

Q. What is your business, sir?

A. I am in the laundry business.

Q. Do you know Dr. Litman?

A. Yes, sir.

Q. Do you know other people who know him?

A. Yes, I do.

Q. What is his reputation for honesty and integrity among those other people?

A. Good.

Mr. Schwartz: Cross examine.

CROSS-EXAMINATION

By Mr. Fogwell:

Q. Do you do his laundry work at the hospital?

A. We have for a number of years, yes, sir.

Mr. Fogwell: That is all.

The Court: Call your next witness.

(Witness excused.)

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(111) RUSSELL W. MARTIN, the next witness, called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Schwartz:

Q. Mr. Martin, what is your principal occupation?

A. I am only partially employed at the present time. I have been in the garage business for about twenty-eight years.

Q. Do you know Dr. Litman?

A. Very well, sir.

Q. Do you know other people who know him?

A. Quite a few.

Q. What is his reputation for truth and honesty?

A. It is absolutely perfect in our opinion.

Mr. Schwartz: That is all.

CROSS-EXAMINATION

By Mr. Fogwell:

Q. Mr. Martin, you don't have any knowledge of the doctor's bookkeeping situation, do you?

A. None whatever, sir.

Mr. Fogwell: That is all, sir.

(Witness excused.)

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(112) DR. EMMANUEL FISCHOFF, the next witness, called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Schwartz:

Q. Dr. Fischoff, do you know Dr. Litman?

A. Yes, I do.

Q. Before we come to that, what is your profession?

A. I am a dentist.

Q. How long have you been engaged in dentistry?

A. I have practiced since 1935.

Q. Are you connected with any institutions?

A. At the present I am connected with the Wynnefield Hospital, head of the dental department. Previous to that I was with the Salvation Army Hospital, and incidentally that is where I met Dr. Litman. He was doing charity work there.

Q. How long have you known Dr. Litman?

A. I would say close to ten years.

Q. Have you been on the staff of the Wynnefield Hospital?

A. I have.

Q. During that period of time?

A. No, sir. When Dr. Litman opened his hospital he knew me from the Salvation Army Hospital and he asked me would (113) I care to take over the department there. I was head of the department at the Salvation Army hospital.

Q. When was that?

A. When the hospital was there seven or eight years ago. I have kept no tract of that.

Q. Are you familiar with the help situation there?

A. It is typical of most hospitals, it isn't good, it isn't bad, but if anything he seems to be having more trouble than others.

Q. Do you know other people who know Dr. Litman?

A. Yes, I do.

Q. What is his reputation among those people for integrity and honesty?

A. Those I know all seem to think it is good.

Mr. Schwartz: That is all, cross examine.

Mr. Fogwell: I have no questions, doctor.

The Court: Stand aside. Call your next witness.

(Witness excused.)

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(114) MORRIS SCHNALL, the next witness, called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Schwartz:

Q. May I ask what your occupation or profession is, sir?

A. I am a Rabbi.

Q. Do you know Dr. Litman?

A. Yes, sir.

Q. How long have you known him?

A. About ten years.

Q. Do you know other people who know him?

A. Yes, sir.

Q. What is his reputation among those people for truth and honesty?

A. Very good, sir.

Mr. Schwartz: That is all.

CROSS-EXAMINATION

By Mr. Fogwell:

Q. Is Dr. Litman in your—I was going to use the word Parish?

A. He is a member of my congregation, sir.

Mr. Fogwell: Thank you very much, that is all.

(Witness excused.)

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(115) BENJAMIN H. SHUSTER, the next witness, called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Schwartz:

Q. What is your profession, sir?

A. Physician.

Q. Do you know Dr. Litman?

A. Very well, sir.

Q. How long have you known him?

A. Anyway fifteen years or more.

Q. Do you know other people who know him?

A. Oh, yes, a number of people.

Q. What is his reputation for truth and honesty among other people?

A. I have known him for many years and his reputation has always been excellent.

Mr. Schwartz: That is all.

CROSS-EXAMINATION

By Mr. Fogwell:

Q. Are you associated with the doctor medically in any way?

A. No, sir. I have operated at his hospital a couple of times maybe is all.

(116) Q. You are associated with the Wynnefield Hospital?

A. I think I was asked to be consultant at one time, and they might have me on the list as consultant, ear, nose and throat.

Q. Do you know anything about his bookkeeping system?

A. I know nothing about his bookkeeping, or finances. I only know him as a nice man.

Mr. Fogwell: That is all, thank you, sir.

(Witness excused.)

Mr. Schwartz: That closes the defense, if your Honor please.

The Court: Any rebuttal?

Mr. Fogwell: With your permission we will not offer any rebuttal.

Mr. Schwartz: We do desire to offer in evidence the letter of June 6, 1955, which was marked as Defendant's Exhibit No. 1.

The Court: It may be received.

(Thereupon, the said letter heretomarked Exhibit D-1, Witness Lynn, was received in evidence.)

Mr. Fogwell: And we also offer in evidence letter marked as Government's Exhibit No. G-8.

The Court: Let it be received.

(117) (Thereupon, the said letter, heretofore marked Exhibit G-8, Witness Brahin, was received in evidence.)

Thereupon, the Jury was excused at 12:15 p. m., until 2:00 o'clock, p. m.

Mr. Schwartz: If your Honor please, I renew my motion that a judgment of acquittal be entered for the defendant.

The Court: The motion is overruled and exception may be noted.

Thereupon, the Court was adjourned until 2:00 o'clock, p. m.

AFTERNOON SESSION—DECEMBER 4, 1956.

The Court was reconvened at 2:00 o'clock.

The Court: All right, Mr. Fogwell, you may proceed with your argument.

Whereupon, the case was argued by counsel for plaintiff and defendant and, thereupon, the Court charged the Jury in the following words and figures, to-wit:

COURT'S CHARGE

(118) Ladies and Gentlemen, give me your attention a few minutes, please. You have listened attentively to the evidence in this case and heard the arguments of counsel, and it now becomes my duty to charge you as to the law of the case, after which it will be your duty to determine from the evidence which you have heard what are the facts in the case, apply to the law to those facts, and render a true and righteous verdict.

You are in no way concerned with any punishment which may be imposed upon the defendant if you should find him guilty. In the Federal Court the Federal Judge fixes the punishment, if any, and the amount of punishment to be imposed should not enter into your deliberations at all. You are charged with one duty and only one, and that is to determine and say by your verdict whether this defendant is guilty or not guilty of the offense charged.

The law presumes this defendant, as well as any other person charged with an offense, is innocent until by competent evidence he is proved to be guilty. The indictment in this case raises no presumption of guilt, and the defendant is entitled to this presumption of innocence throughout the trial, until it has been removed, in your opinion, by evidence proving him guilty beyond a reasonable doubt.

The burden of proof rests upon the United States (119) to prove, beyond a reasonable doubt, the guilt of the defendant before he can be found guilty, and there must be proved all the elements necessary to constitute the elements of the offense charged so as to exclude any reasonable hypothesis of innocence.

It is not sufficient that the defendant upon speculative theory or conjecture may be guilty, or that by the preponderance of evidence his guilt is more probable than his innocence, for until his guilt has been proved beyond a reasonable doubt, and as charged in the indictment, the presumption of innocence will prevail.

Reasonable doubt does not import a mere possible doubt,

because everything relating to human efforts and depending upon oral evidence is open to some possible or imaginary doubt. A reasonable doubt exists if after the entire comparison and consideration of all the evidence your minds are left in such condition that you cannot say you feel an abiding conviction of the truth of the charge. Reasonable doubt is not a strained conjecture but an actual, sincere mental hesitation caused by either insufficient or unsatisfactory evidence.

You are the sole judges of the credibility of the witnesses, and the weight to be given their evidence, and in determining this you are entitled to take into consideration (120) their bias, their feeling, their interest in the outcome of the case, if any such appears, their manner of testifying, their candor and frankness, and any other matter you would ordinarily consider in judging the weight to be given statements of persons with whom you come in contact.

Now such comments as I may make upon the evidence will be made only in an effort to assist you, and not at all to infringe upon your right and duty to determine from the evidence what are the facts in the case.

This defendant has introduced evidence as to his previous good character. Such evidence should be considered, by you and given such weight as it is entitled to receive, and considered in the light of all the other testimony. If a person by his conduct has built up a reputation of good character it is certainly a fact which should be considered, and the benefit of which should be given to him, but it is only one fact to be considered along with the other facts, and previous good character should not permit a person to escape conviction if, considering all of the facts, including the fact of previous good character, you are satisfied of his guilt beyond a reasonable doubt.

A defendant is not obliged to take the witness stand in his own behalf. He may, if he chooses, submit his case on the evidence of the Government, and that of other (121) witnesses, and you are not to draw any inference of guilt from the fact that he has not taken the witness stand.

Now coming specifically to this case, the basic doctrine upon which this case is founded is what is called an Information, and it is in three counts. You should make a finding of guilty or not guilty as to each count, because they charge separate offenses.

Count one refers to the Income Tax Return of the defendant for the calendar year 1952; Count two refers to the return for the calendar year 1953 and Count three refers to the return for the calendar year 1954.

Now the pertinent parts of the statute primarily involved are as follows:

> "Every individual having for the taxable year a gross income of $600 or more shall make a return."

This, of course, is a personal obligation on the taxpayer. The fact this defendant employed an accountant may of course be considered by you in consideration of whether his conduct was willful, but it is the duty of the taxpayer himself to see that his return is filed.

Now the other statute you are concerned with is:

> "Any person required to pay any estimated tax or tax, or required by law or regulations (122) to make a return or declaration, who wilfully fails to make such return or declaration at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor."

Now the times involved as to the calendar year 1952, that return was due March 15, 1953, or not later than that. However, this defendant secured extensions of time aggregating six months, so that return was not due until September 15, 1953.

Several extensions were obtained for the return for the calendar year 1953, which was due March 15, 1954, and that time was extended for six months.

As to the calendar year 1954 extensions were granted there, and that return was not due, the law having been slightly changed, that return was orignally due March 15, and changed to April 15, and the time was extended according to requests until October 15, 1955.

Now the returns were not filed on or before the dates which I have mentioned when they were due. There is no question about that. What you are required to do is to determine whether or not the defendant's failure to file these returns at the time they were due was willful. You heard me "willfully fails to make such return". That (123) word "willful is the key word which you have got to consider. The word "willful" has a number of different meanings, depending upon the upon the context with which it is used. As it is used in this statute with which we are dealing here today it means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent. Mere negligence or carelessness, even gross negligence, is not sufficient to constitute willfulness. This, of course, is a criminal proceeding, and the word "willful" as used in this statute means an act done with a bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, perversely, or with a bad motive.

I charge you the only bad purpose or bad motive necessary for the Government to prove in this case, however, is the deliberate intention not to file returns which the defendant knew ought to be filed so the Government would not know th extent of his liability, so that is your problem, Ladies and Gentlemen, in a nutshell.

It is your duty and obligation to weigh this evidence and determine whether or not this failure to file returns on the proper dates was willful. Now if you come to the conclusion the action, or lack of action, of this defendant in filing his returns was due to inadvertence or carelessness or negligence, even gross negligence, then you (124) should acquit him. If, on the other hand, you are satisfied, beyond a reasonable doubt, that the defendant wilfully failed to make these returns, with a bad purpose, of concealing from the Government the extent of his tax liability, then you should find him guilty.

May I see counsel and the court reporter in chambers?

IN CHAMBERS

The Court: All right, gentlemen.

Mr. Fogwell: My first suggestion is that you charge the verdict must be unanimous.

The Court: If you think it is necessary I will tell them.

Mr. Fogwell: I think it is required in this Circuit. The only other thing I would ask your Honor to do is to put a sentence in on punctuality, as found in the Spies opinion, 317 U. S. p. 496, which reads:

> "Hence the willful failure to make a return, keep records, or supply information, is made a misdemeanor without regard to the existence of tax liability. Punctuality is important to the fiscal system, and there are sanctions to assure punctual as well as faithful performance of these duties."

(125) The Court: I overrule that suggestion. Anything else?

Mr. Fogwell: No, sir.

The Court: All right, for the defendant. I suppose you except to my refusal to give certain points?

Mr. Schwartz: I was particularly anxious to have No. 2 of my requests for points of charge.

The Court: I was going to suggest you could except if you want to, to my refusal to give the points as requested by you.

Mr. Schwartz: I except to the refusal of the Trial Judge to charge in accordance with the defendant's written requests for points of charge submitted, being points 1 to 14, inclusive. I still think they ought to know something about the negligence of the accountant. After all if it is attributable to his negligence, as the Government argues, they ought to know what you think about that.

The Court: I think I covered that. I have covered it as much as I am going to anyway.

Mr. Schwartz: That is all. Of course I made a motion for an acquittal, and I don't think you actually ruled on it.

The Court: Not the second one, but you may note the motion for acquittal made at the end of all the testimony (126) is overruled.

Thereupon, the Court and counsel returned into the courtroom.

The Court: Ladies and Gentlemen of the Jury, it has been called to my attention I omitted to say to you that any verdict which you render must be unanimous. I assumed you knew that, but anyway I am telling you now any verdict you render must be unanimous.

Retire to your room and consider of your verdict.

Whereupon, the Marshal was sworn to take charge of the Jury, and the Jury retired to consider of its verdict, at 3:10 o'clock, p. m., and returned into the courtroom at 4:30 o'clock, p. m.

Deputy Clerk Crisswell: Members of the Jury have you agreed upon your verdict?

A Juror: We have.

Deputy Clerk Crisswell: How say you, do you find the defendant guilty or not guilty on Count No. 1?

A Juror: Guilty.

Deputy Clerk Crisswell: And as to Count No. 2?

A Juror: Guilty.

Deputy Clerk Crisswell: As to Count No. 3?

A Juror: Guilty.

The Court: Very well, you may so record the verdict. (127) Deputy Clerk Crisswell: Members of the Jury please harken to your verdict as recorded by the Court in the issue joined in this indictment between the United States of America and Benjamin N. Litman. You say you find the defendant, Benjamin Litman, guilty on each of the counts, 1, 2 and 3, in the manner and form he stands indicted.

The Jury: We do.

Deptuy Clerk Crisswell: So say you all?

The Jury: We do.

The Court: Ladies and Gentlemen, you are discharged from further consideration of this case, and may be excused now.

Thereupon, the jury retired.

The Court: Mr. Fogwell, has there been any presentence report made in this case?

Mr. Fogwell: No, sir. Mr. Duckree is here from the Probation Department.

Mr. Duckree: Would your Honor desire one?

The Court: You have not made one?

Mr. Duckree: No, sir.

The Court: You have no information at all?

Mr. Duckree: No, sir.

The Court: Gentlemen, I don't like to cause unnecessary trouble, but as I told you at the beginning, I (128) wanted to take up the matter of sentence at the conclusion of the trial, but I want to consider it thoroughly, and I want to hear some facts, and in all frankness I am tired, and I would much prefer to do it in the morning the first thing. We will convene here at ten o'clock tomorrow morning, and as I said, this is a matter I want to give proper consideration to, and it is a little late, and frankly I am tired, and would much prefer to do it tomorrow morning.

Mr. Schwartz: Do you want us to bring in any other witnesses?

The Court: You brought in character witness, and a minister came in my office during the noon recess and told me he had been called to testify. That was after I had adjourned, and he said he had come to testify as to Dr. Litman's character. I don't see any need for further

witnesses on the general character of the defendant, but I do want to hear you as to the situation of the defendant.

Mr. Schwartz: We want to file a motion that the verdict is against the weight of the evidence, and also on the ground the Court refused to charge points requested by the defendant in the charge to the jury; and, also, to file a motion for acquittal on the ground the evidence does not warrant a conviction of any kind. That is customary within the five day period, and it is usual to defer sentence (129) until the motions have been disposed of. Do I understand your Honor proposes to hear the motion tomorrow and pronounce sentence?

The Court: You had not made the motion before, and I will consider that and pass on it tomorrow.

Mr. Schwartz: Will your Honor be open to argument on the motion tomorror or would you rather consider it in your own mind?

The Court: I will, of course, hear you. I don't think it is a matter for extensive argument, because I think you made your position as to the law pretty clear, but I will pass on the motion before I pronounce sentence, and I will be giving that some thought also and will hear you briefly on that, but come prepared for consideration of the matter of sentence.

Deputy Clerk Crisswell: Is the same bail continued pending sentence?

The Court: Same bail continued to tomorrow morning. Be back here tomorrow morning. Adjourn court until 10:00 o'clock tomorrow morning.

The [illegible] was adjuorned at 4:45 o'clock, [illegible] morning.

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(130) DECEMBER 5, 1956—MORNING SESSION

The Court was reconvened at 10:00 o'clock.

The Court: All right, sir, do you want to be heard on your motion?

(The motion was argued by Mr. Schwartz.)

The Court: I cannot agree with your argument, Mr. Schwartz. I think the evidence was ample for admission to the jury. All the facts, the essential elements of the offenses were admitted without conflict except the element of willfulness, and that was submitted to the jury, I think under a charge which was entirely fair to the defendant, and the jury, which is under our system the proper tribunal to determine intent, and I think it is the best system which could be devised for the determination of intent, and I think in my charge to the jury if I leaned at all I leaned in favor of the defendant, and on that charge the jury found the doctor guilty of willfulness, and I think the evidence was sufficient for them to make such a finding, so I will have to overrule your motion.

* * *

DEFENDANT'S REQUEST FOR POINTS FOR CHARGE.

1. "The evidence which you must regard must be such as to exclude every reasonable hypothesis except that of guilt before you may convict. If it does not exclude every hypothesis of innocence you must acquit."

United States v. Dolasco, 184 F. (2d) 746 (C. A. 3rd, 1950);
United States v. Alfono, 152 F. (2d) 393 (C. A. 3rd, 1945);
United States v. Tatcher, 131 F. (2d) 1002 (C. A. 3rd, 1942);
United States v. Kemble, 197 F. (2d) 316 (C. A. 3rd, 1952);
United States v. Elwirt, 231 F. (2d) 928 (C. A. 9th, March 22, 1956).

2. If you find that the defendant's failure to file timely returns for 1952, 1953 and 1954 was due to the negligence or carelessness of his accountant engaged to file such returns, you must find the defendant "not guilty".

3. If you find that the failure to file timely returns was due to gross negligence and without reasonable justification, if you also find that such failure to file timely returns was not prompted by bad faith or evil intent, you must find the defendant "not guilty".

4. The Government must prove that the defendant failed to file timely returns for the years 1952, 1953 and 1954 with bad faith or evil intent and the mere failure to file such timely returns is proof of neither.

5. The fact that the defendant and his accountant cooperated fully with the agents in explaining the reasons for failing to file timely returns for 1952, 1953 and 1954 and in preparing the returns which were finally filed in March, 1956, for those years negatives the existence of bad faith and evil intent.

6. The fact that the defendant filed an estimated return for 1952 and paid the tax estimated for that year negatives bad faith and evil intent in failing to file a timely return for 1952.

7. The fact that the defendant requested three extensions of time to file his 1952 Income Tax Return, which extensions of time expired September 15, 1953, negatives his bad faith and evil intent in failing to file a timely return for 1952.

8. The fact that the defendant requested several extensions of time to file his 1953 Income Tax Return, which extensions of time expired September 15, 1954, negatives his bad faith and evil intent in failing to file a timely return for 1953.

9. The fact that the defendant requested several extensions of time to file his 1954 Income Tax Return, which extensions of time expired October 15, 1955, negatives his bad faith and evil intent in failing to file a timely return for 1954.

10. The fact that no tax was due on the return filed for the year 1954 negatives the defendant's bad faith and evil intent in failing to file a timely return for 1952.

11. The numerous requests for extensions of time to file Income Tax Returns for the years 1952, 1953 and 1954, together with the letter written to the Internal Revenue Service on June 6, 1955, explaining the failure for filing timely returns for the above years proved the intention of the defendant to file timely returns and negatives the existence of bad faith and evil intent when timely returns were not filed.

12. Even if you believe that another accountant other than the one who represented the defendant could and would have filed timely returns for the defendant for the years 1952, 1953 and 1954, and if you believe that the

failure to file timely returns was the fault of the defendant's accountant, your verdict must be "not guilty".

13. If you find from the evidence that the defendant did not know that it was a criminal offense not to file a timely return and believed that the only penalty was a civil late filing penalty for failure to file timely returns, your verdict must be "not guilty". *Hargrove v. United States*, 67 F. (2d) 820.

14. Under all the evidence in this case, your verdict must be "not guilty".

Respectfully submitted,

/s/ LEONARD J. SCHWARTZ,
Leonard J. Schwartz,
Attorney for Defendant.

Of Counsel:

FOX, ROTHSCHILD, O'BRIEN & FRANKEL,
1732 Bankers Securities Building
Philadelphia 7, Pa.

MOTIONS OF THE DEFENDANT FOR JUDGMENT OF ACQUITTAL AND FOR NEW TRIAL.

1. The defendant, having moved the Court for a judgment of acquittal at the close of the evidence, now renews its motion for a judgment of acquittal.

In the alternative:

2. The defendant moves the Court to grant him a new trial for the following reasons:

(a) The Court erred in denying defendant's motion for acquittal at the conclusion of the evidence.

(b) The verdict is contrary to the weight of the evidence.

(c) The verdict is not supported by substantial evidence.

(d) The Court erred in charging the jury and in refusing to charge the jury as requested by defendant.

(e) The Court erred in not instructing the jury that the statement of the United States Attorney in his closing argument that the defendant had failed to timely file income tax returns for the years 1948, 1949, 1950 and 1951 was an incorrect statement and unsupported by the evidence.

(f) The Court erred in not instructing the jury that the statement of the United States Attorney in his closing argument to the effect that unless the failure to file a timely return was accidental, such failure constituted a wilful failure to file a timely return was incorrect.

Defendant reserves the right to file additional reasons in support of his motion for new trial within five days from the date of the jury's discharge.

Respectfully submitted,

/s/ LEONARD J. SCHWARTZ,
Leonard J. Schwartz,
Attorney for Defendant.

Of Counsel:

FOX, ROTHSCHILD, O'BRIEN & FRANKEL,
1732 Bankers Securities Building,
Philadelphia 7, Pa.

Dated: December 5, 1956

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 428

BENJAMIN N. LITMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LEONARD J. SCHWARTZ,
1732 Bankers Securities Bldg.,
Philadelphia 7, Pa.,
JACOB KOSSMAN,
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Philadelphia 7, Pa.,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No.

BENJAMIN N. LITMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Benjamin N. Litman, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 8, 1957.

I. OPINION BELOW.

The opinion below has not yet been reported (Appendix B, pp. 6a-19a).

II. JURISDICTION.

The judgment of the Court of Appeals (Appendix C, p. 11a) was entered on July 8, 1957. A timely petition for rehearing was denied on August 6, 1957 (Appendix, p. 12a). The jurisdiction of this Court is invoked under the Act of June 25, 1948 ch. 646 Stat. 928, 28 U. S. C. § 1254(1).

III. QUESTIONS PRESENTED.

1. Whether, in order to sustain a conviction for knowingly and willfully failing to file income tax returns at the times required, in violation of § 145(a) of the Internal Revenue Code of 1939 and § 7203 of the Internal Revenue Code of 1954, it is incumbent on the prosecution to prove that petitioner had an evil motive, in addition to the mere late filing of the returns.

2. Whether a conviction for knowingly and willfully failing to file income tax returns at the times required by law can be sustained where the evidence shows that the defendant (petitioner) relied on his accountant to file timely returns or to maintain him in good standing with the Internal Revenue Service; that his accountant obtained extensions of time for filing the returns; that the petitioner and his accountant never knew that late filing of returns would be criminal; that the returns were filed 6 months before the information against the petitioner was made by the Government and the Trial Judge refused to charge as requested that if the petitioner's failure to file timely returns was due to the negligence or carelessness of the accountant, the petitioner must be found not guilty.

IV. STATUTES INVOLVED.

1. § 145(a) of the Internal Revenue Code of 1939, 26 U. S. C. 145 provides:

"§ 145. Penalties

"(a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or

regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

2. § 7203 of the Internal Revenue Code of 1954, 26 U. S. C. 7203 provides:

"WILFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

V. STATEMENT OF THE CASE.

Petitioner, a physician operating a small hospital, was charged by an information in 3 counts filed September 13, 1956, with willfully and knowingly failing to file federal income tax returns at the proper times for the years 1952, 1953 and 1954.

THE GOVERNMENT'S EVIDENCE.

Charles Brahin, a certified public accountant, filed the petitioner's income tax returns for 1948 to 1951, inclusive, and was engaged by the petitioner to prepare and file his returns for 1952, 1953 and 1954 before such returns were due to be filed (R23a-R24a).

During 1953, Brahin requested 3 extensions of time for filing the 1952 return, which requests were granted by the District Director of Internal Revenue, the last such extension expiring on September 15, 1953 (R12a-R15a).

During 1954, Brahin also requested 3 extensions of time for filing the 1953 return, which requests were granted, the last extension expiring September 15, 1954 (R13a-R15a).

During 1955, Brahin requested 4 extensions of time for filing the 1954 return, which requests were granted, the last extension expiring on October 15, 1955 (R14a-R15a).

All requests for extensions of time were made by Brahin in writing over his signature and on his letterheads and stated as the reasons for the desired extensions that Brahin was ill and overburdened with work and that he was unable to complete the petitioner's returns. On one occasion only, August 13, 1953, the request for an extension showed the signatures of both Brahin and the petitioner (R13a).

On May 23, 1955, the Internal Revenue Service, in a letter to the petitioner, inquired whether the income tax returns for the years 1952, 1953 and 1954 had been filed (Exhibit G8) (R78a). In response to this letter, Brahin telephoned William F. Lynn, Jr., Special Agent, Internal Revenue Service, stating that the filing of income tax

returns for the years 1952, 1953 and 1954 had been delayed because the petitioner's son was critically ill, the petitioner was ill, the petitioner had a dishonest bookkeeper and the petitioner and Brahin were unable to find the necessary records after the bookkeeper left the petitioner's employ (R29a).

On June 6, 1955, the petitioner wrote to the Director explaining that the return for 1952 was delayed because of the illness of the petitioner's son and the difficulties the petitioner had with his hospital affairs; that in October, 1953, he engaged one Irving B. Kruger, a certified public accountant, to bring the petitioner's records for 1952 up to date; that in December, 1953, Kruger had forged checks, was discharged and was arrested, convicted and sentenced to imprisonment; that after Kruger's discharge in December, 1953, the petitioner's records for 1952 and 1953 could not be found; and that the petitioner had finally found the records for those years among old medical records and that the records and returns for 1952 and 1953 were being completed and would be filed together with the return for 1954 (Petitioner's Exhibit 1) (R29a, R78a).

On December 15, 1955, Special Agent Lynn saw the petitioner, found him cooperative and affirmed the petitioner's reasons for failing to file timely returns (R19a). Lynn also spoke to Brahin in December 15, 1955, who advised him that he was preparing the petitioner's returns for the years 1952, 1953 and 1954 (R20a). Lynn arranged with Brahin that he and Agent Galato would look over his work papers and the returns before they were filed (R20a-R21a).

On January 26, 1956, Lynn and Galato met with Brahin and went over Brahin's work papers (R21a). Thereafter, Lynn and Galato were at the office of Brahin 5 or 6 times, 3 or 4 hours each time, checking figures and the work papers prepared by Brahin (R22a).

Brahin explained to Lynn and Galato that he was unable to file the petitioner's income tax return for 1952

because the cash disbursement book was incomplete (R25a); that efforts were made to complete the book for 1952 and that Kruger, a certified public accountant, was engaged in September, 1953, to bring the 1952 and 1953 cash disbursement book into shape; that when Kruger left in December, 1953, cancelled checks and checkbooks were missing for 1952 and 1953 (R25a) and that cash disbursement sheets for the years 1952 and 1953 were missing which were finally found among old medical records (R25a-R27a); that the petitioner's problem was large turnover and incompetent clerical help who, notwithstanding Brahin's instructions, did not maintain satisfactory cash disbursement records for 1952 and 1953 (R27a); and that while Kruger, after September, 1953, did a good job in writing up the cash disbursement books for 1952 and 1953, after Kruger left in December, 1953, missing pages of the books, checks and checkbooks could not be found although Brahin searched continuously from January, 1954, until sometime in 1955 (R25a-R27a).

The records of the Internal Revenue Service showed that for the year 1948 no estimated tax return was filed and that the 1040 return was filed on July 15, 1949, without penalty; that for the year 1949 no estimated tax return was filed and a final 1040 return was filed showing no tax due; and that for the year 1950 no estimated tax return was filed but a final 1040 return was filed delinquently on September 11, 1952, and a delinquency penalty imposed in the amount of $209.95 which was abated on affidavit by petitioner showing good reason for late filing and reduced to $75.58 (R6a-R9a-R16a).

The tax returns of the petitioner filed March 16, 1956, showed tax due for 1952 in the amount of $2,626.92 against which an estimated tax was paid, $845.00, with estimated returns filed March 15, 1952, and January 15, 1953, leaving a balance due of $1,781.96. The tax due for 1953 was $534.48 and for 1954 no tax was due. All taxes shown to be due were paid.

EVIDENCE FOR PETITIONER.

Brahin confirmed the statements attributed to him in Agent Lynn's testimony and in addition testified to the following effect:

He was a public accountant practicing approximately twenty years (R53a). He first began serving the petitioner in 1949. It was his decision to ask for extensions of time for filing the 1952, 1953 and 1954 returns and the petitioner never suggested that no returns be filed for the years in question (R36a). The requests for extensions made in 1953 for filing the 1952 return were necessary because he found early in 1953 that the cash receipt record for 1952 was unsatisfactory in that it failed to show the sources of the receipts broken down in explanatory columns so that Brahin could determine whether the receipts were from personal loans, mortgages, exchanges or earned income (R37a). He also found that the cash disbursement book for 1952 was not complete in that it failed to show a satisfactory classification of the disbursements and he could not distinguish between the disbursements that were purely personal and those that were business expenses (R38a).

During 1953, he instructed the petitioner's clerical help (7 or 8 different girls) in the manner in which the cash receipt and cash disbursement books were to be completed (R39a). By September 15, 1953, when the last extension for filing the 1952 return expired, the cash disbursements had not yet been properly written up for that year.

Brahin testified that it was not his practice to make up cash disbursement records for his clients (R45a); that the petitioner requested him to file a return even if it was not complete and Brahin said that no return should be filed unless it was complete (R46a-R47a).

The Government, in cross-examination of Brahin, made the point (R57a) that even after the entries were extended, the accountant checked them with the base records himself

and the extended entries could, therefore, have been just as easily made by him.

Brahin, in September, 1953, explained to the petitioner that he was still unable to file the return for 1952; that no further extensions could be obtained and that when a final return was filed he would be subject to a penalty of 5% and interest at ½ per cent per month (R45a). He never warned the petitioner that it was a criminal offense not to file a timely return because Brahin first learned that it was a criminal offense in February, 1956, when Agent Lynn so advised him (R45a-R49a).

While the 7 or 8 clerical employees of the petitioner whom the accountant instructed in 1953 to complete the 1952 records were incompetent, Mr. Kruger, CPA, was engaged in October, 1953, and, in the words of Brahin, did a good job in completing the records for 1952 and 1953 (R39a).

The accountant, after seeing that Kruger did a good job in October, 1953, made no effort to complete the 1952 returns until January 1954, when he called to obtain the records for preparing both the 1952 and 1953 returns (mistakenly referred to by the witness as October, 1953, on R39a. See R50a).

When Brahin came to the office of the petitioner in January, 1954, he found that pages from the cash disbursement book were missing for the years 1952 and 1953 (R40a); several months' cash receipt and cash disbursement sheets were missing for several months in each year as well as the check stubs (R40a-R41a).

He never advised the petitioner that the Internal Revenue Service must be advised that the records were partly lost in December, 1953, and that an estimated return should be filed (R60a). He admitted under cross-examination (R59a) that where records are lost or destroyed, it is proper to report the loss to the Government and obtain permission to use estimated figures. The petitioner requested

Brahin to file a tentative return and he refused to do so (R46a).

Brahin called at the petitioner's office during 1954 and 1955 sometimes once a month and sometimes 3 or 4 times each month, either to direct the writing up of the records or to hunt for them when they could not be found. Despite his searches, he did not find the missing records until it occurred to him to search among old medical records comprising over 1,000 folders in numerous cartons where he found the missing sheets inserted in different medical case folders as well as the missing checks and checkbooks and stubs (R42a). He could not understand how the missing record got among the medical records (R34a).

Upon finding the missing records Brahin engaged a Mrs. Sanders, during September, 1955, an experienced bookkeeper (R64a), for part time work. Mrs. Sanders took approximately a month to complete the cash receipt and disbursements records for 1952 and 1953, which were mainly completed when she took them over, and to write up the cash disbursement record for 1954 (R68a). After Mrs. Sanders completed her work (October, 1955), the month in which the last extension for filing the 1954 return expired, Brahin took 10 weeks to prepare his work papers (R47a). Agent Galato and Agent Lynn, beginning with January, 1956, met with Brahin periodically to go over the figures in Brahin's work papers (R48a), and the returns were finally filed on March 16, 1956, 6 months after Mrs. Sanders completed her work.

The jury found the petitioner guilty and he was sentenced to 60 days' imprisonment on each of the 3 counts, to run concurrently, and fined $500 on Count No. 1.

On appeal, the judgment of conviction was affirmed, the Court below saying (Appendix, *infra*, p. 8a) that "the defendant's failure to file income tax returns when due was willful in that the omission was advertent and motivated by the bad purpose of preventing the Government from receiving returns at the time required by law".

VI. REASONS FOR GRANTING THE WRIT.

The two points presented by this record in its present posture has an importance far transcending the fate of this individual. For indications are not wanting that the Courts of Appeals have succeeded in wholly obliterating a vital element in the criminal provisions of the Internal Revenue Code, contrary to the rule of law enunciated in *United States v. Murdock*, 290 U. S. 389 (1933).

VII. ARGUMENT.

1. The Court below, in its opinion affirming petitioner's conviction, stated as follows:

> "We think this evidence gave the jury an adequate basis for a finding that the defendant's failure to file income tax returns when due was 'willful' in that the omission was advertent and motivated *by the bad purpose of preventing the government from receiving returns at the time required by law.* . . . There was enough here to justify the jury in concluding that the defendant intentionally persisted in a course calculated to avoid or to disable himself from supplying his accountant with information appropriate and adequate for preparing his tax returns until the danger of governmental action became obvious and immiment. Since the evidence invited these inferences and defendant offered nothing to counteract them we think he is now in no position to complain that the jury was persuaded that he acted with bad purpose, intending not to fulfill the obligation of timely filing of which he was well aware. 'Punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties.' *Spies v. United States*, 1943, 317 U. S. 492, 496." (Italics supplied.)

In *United States v. Murdock*, 290 U. S. 394, *supra*, at pp. 395-6, this Court, in considering whether the word "wilfully" meant no more than voluntarily, said:

"This Court has held that where directions as to the method of conducting a business are imposed in a Revenue Act to prevent loss of taxes, and the Act declares a wilful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime. . . . And the requirement that the omission in these instances must be wilful to be criminal is persuasive that the same element is essential to the offense of failing to supply information."

Clearly, not fulfilling the obligation of timely filing is not a criminal offense under the *Murdock* decision unless there is an evil motive and an evil motive in internal revenue can only mean the taxpayer is attempting to cheat the Government by concealing or attempting to conceal his actual tax liability.[1]

In this case, there is no such evidence of an evil motive since extensions for the filing of income tax returns were requested by the accountant for the petitioner and granted (R12a-R15a), and the tax returns for the years involved were all filed on March 16, 1956 (R4a). Having requested timely extensions for the filing of tax returns, the Government was notified by the petitioner that he had possible tax liabilities. If the petitioner had filed a false return, it might have remained unattacked because the tax authorities cannot possibly audit every taxpayer's return. If he had never asked for an extension, the tax authorities might not even have the starting point of detecting whether the petitioner was subject to attack. (It will be noted the amount of taxes due from the petitioner were relatively small sums—$1,781.96 for 1952, $534.48 for 1953 and none for 1954.)

1. The Court below (Appendix B, p. 10a) evidently relied on this Court's statement in *Spies v. United States*, 1943, 317 U. S. 492, 497-8, that the concept of willfulness means, "Mere voluntary and purposeful, as distinguished from accidental omission to make a timely return might meet the test of wilfulness." It is submitted with deference that this definition of willfulness is merely dicta and in conflict with the definition of willfulness in the *Murdock* case.

Therefore, since there was no proof of the indispensable ingredient of the offense charged in the information, viz., an evil motive, it follows that petitioner's conviction on the information cannot be sustained.

2. A. The District Judge was asked by the petitioner to charge the jury as follows:[2] "If you find that the defendant's failure to file timely returns for 1952, 1953 and 1954 was due to the negligence or carelessness of his accountant engaged to file such returns, you must find the defendant 'not guilty'." (R88a). Counsel for petitioner was "particularly anxious" to have this charge made. The request was refused (R83a).

The evidence discloses that the petitioner, a doctor, connected with a small hospital, when he was interviewed by the internal revenue agents, cooperated and answered all questions (R19a). The agents communicated by telephone with the accountant and were informed that he was going to file petitioner's tax returns in December of 1955 (R20a). The internal revenue agents later visited the accountant and were informed that he was engaged to file the tax returns for the petitioner, but that he was unable to file the returns because some of the records had been missing (R24a-26a). The missing records were found in 1955 (R27a).

The accountant testified that it was his decision to ask for the various extensions and that the petitioner never told him or suggested that no return be filed for the tax years of 1952, 1953 and 1954 (R36a). The accountant further stated that he told the petitioner that he could not file a return for him at that time and that it would "cost him five per cent penalty, and interest, one-half per cent a month", and that he never knew it was a criminal offense

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2. In *United States v. Murdock*, *supra*, the Court stated at page 396: "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief."

not to file a timely return[3] (R45a). The accountant further testified that the petitioner talked to him about filing a return even if it was not complete, but the accountant refused to file such a return (R46a-47a). The accountant continually stated that he never knew it was a criminal offense to fail to file a return on time, and that he was under the impression that there were only civil penalties (R49a, R50a, R53a-R54a). The accountant had been a public accountant for 20 years (R53a).

The evidence is uncontradicted that the petitioner relied on the accountant to file timely returns or to otherwise maintain him in good standing with the Internal Revenue Service; that in October, 1953, when Mr. Kruger, CPA, was engaged, he did a good job in bringing the records up to date (R39a), the accountant made no effort to prepare and file the 1952 return until January, 1954, when he called at petitioner's office to prepare both the 1952 and 1953 returns to be filed together (R39a, R50a); that the accountant at that time found some of the records missing for the years 1952 and 1953; that he did not file an estimated return (R46a, R60a) even though he admitted under cross-examination (R59a) that where records are lost or destroyed, it is proper to report the loss to the Government and obtain permission to use estimated figures; that he had all the records necessary to enable him to file returns for the years 1952, 1953 and 1954 by October, 1955, the month in which the last extension for filing the 1954 return expired, but the accountant took 10 weeks to prepare his work papers (47a) and then held up filing the returns until Agent Galato and Agent Lynn periodically went over the figures of the accountant (R48a).

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3. The government agent testified that it was the practice in the internal revenue office to impose a five per cent penalty if tax returns were filed beyond the period to which extensions were granted, but that if the taxpayer could show a good reason for not having filed the income tax return within the period that penalty was abated (R. 16a).

If the issue as to whether petitioner's failure to file timely returns was due to the negligence of his accountant had been submitted to the jury, this Court would normally be precluded from reviewing or disturbing the inference of fact drawn from the evidence by the jury, but the Court not only refused to so charge, but on the contrary, stated: ". . . it is the duty of the taxpayer himself to see that his return is filed." (R81a).

In *Bartchy v. United States*, 319 U. S. 484, where defendant was charged with the duty of keeping his local draft board advised of his address, this Court, in answer to the government's argument that the defendant is plainly obligated to keep in close communication with the forwarding address, that at his peril the registrant must at short intervals inquire at his last address given to the Board, was of the view that the government demands more than the regulation requires, stating:

> "The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail sent to the address which is furnished to the Board may be by the registrant reasonably expected to come into his hands in time for compliance. Petitioner might have been more diligent by telephoning or calling at the union, but we conclude that he was justified in relying upon the efficiency of this experienced organization in advising him of the arrival of the notice."

Likewise, the petitioner here might have been more diligent, but he was justified in relying upon the advice of an accountant of 20 years' experience. At the very least, he was entitled to have this theory submitted to the jury.

B. The petitioner was found guilty of the crime of "willfully and knowingly failing to make income tax returns at the times required by law" (Appendix A. pp. 1, 2, 3) for the years 1952, 1953 and 1954 as charged in the three counts of the information.

Where the charge is that the accused "knowingly" did or did not do a certain act, ignorance of the law is recognized as a complete defense. It has been held that a person cannot be convicted of voting "knowing himself not to be a voter" if he thought he was qualified to vote, nor of "knowingly receiving a fee to which he is not entitled" if he thought he was entitled to it. *Perkins* in (1939) 88 U. of P. L. Rev. at 51; *cf. Keedy* in 22 H. L. R. at 89 n.l.

Although § 145(a) of the Internal Revenue Code of 1939 and § 7203 of the Internal Revenue Code of 1954 do not contain the word "knowingly", the petitioner was charged with "knowingly" failing to make an income tax return, and the issue was so submitted to the jury. Petitioner obviously cannot be charged with one crime and convicted of another. *Cole v. Arkansas*, 333 U. S. 196.

The present case strikingly illustrates the consequences which follow the erosion of boundaries heretofore delimited with care and precision by this Court in the *Murdoch* case. The requirement of an evil motive has been whittled away by verbal changes, until here it is abandoned so completely that the mere failing to file tax returns on time, without an evil motive, is held to support an inference of willfulness and a criminal conviction. The considerations that impelled review in the *Spies* case—the need for clarifying and restating the scope and meaning of an important federal statute in the face of diverse and beclouding interpretations and obviously incorrect instructions to the jury,—are fully applicable here.

VIII. CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD J. SCHWARTZ,
JACOB KOSSMAN,
Attorneys for Petitioner.

September 1957.

APPENDIX A.

Information.

COUNT I.

The United States Attorney Charges:—

That during the calendar year 1952, BENJAMIN N. LITMAN, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $90,791.83; that on or about March 14, 1953, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1952, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until June 15, 1953; that on or about June 13, 1953, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1952, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until August 15, 1953; that on or about August 13, 1953, through his authorized representative, he had requested a further extension of time for filing his income tax return for the calendar year 1952, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until September 15, 1953; that by reason of such income and said extensions of time he was required by law and regulations, after the close of the calendar year 1952 and on or before September 15, 1953, to make an income tax return to the Director of Internal Revenue in the Eastern District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return at the time required by law and

regulations to the said Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 145(a), Internal Revenue Code of 1939; 26 U. S. C., Section 145(a).

COUNT II.

And the United States Attorney Further Charges:—

That during the calendar year 1953, BENJAMIN N. LITMAN, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $81,856.81; that on or about March 13, 1954, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar years 1953, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until June 15, 1954; that on or about June 14, 1954, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1953, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until August 15, 1954; that on or about August 13, 1954, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1953, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until September 15, 1954; that by reason of such income and said extensions of time he was required by law and regulations, after the close of the calendar year 1953 and on or before September 15, 1954, to make an income tax return to the Director of Internal Revenue in the Eastern District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return at the time required by law and regulations to the

said Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 145(a), Internal Revenue Code of 1939; 26 U. S. C., Section 145(a).

COUNT III.

And the United States Attorney Further Charges:—

That during the calendar year 1954, BENJAMIN N. LITMAN, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $91,281.96; that on or about April 15, 1955, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1954, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until July 15, 1955; that on or about July 14, 1955, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1954, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until August 15, 1955; that on or about August 15, 1955, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1954, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until September 15, 1955; that on or about September 15, 1955, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1954, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until October 15, 1955; that by reason of such income and said extensions of time he was required by law and regulations, after the close of the calendar year 1954 and on or before October 15, 1955, to make an income tax return to the Director of Internal Revenue in the Eastern

District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return at the time required by law and regulations to the said Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U. S. C., Section 7203.

W. WILSON WHITE,
United States Attorney.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA } *ss.:*

Special Agent William F. Lynn, Jr., being duly sworn according to law, deposes and says that he is the Special Agent in the Office of the District Director, Intelligence Division, Internal Revenue Service, Philadelphia, who made the investigation of Benjamin N. Litman and that the facts set forth in the foregoing Information are true and correct to the best of his knowledge, information and belief.

/s/ WILLIAM F. LYNN, JR.

Sworn to and subscribed before me this 13th day of September, 1956.

/s/ J. A. COMEY,
Deputy Clerk, U. S. District Court for the Eastern District of Pennsylvania.

APPENDIX B.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 18, 1957

Before BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed July 8, 1957)

HASTIE, *Circuit Judge*.

A jury has found appellant guilty of the crime of knowingly and willfully failing to make income tax returns at the times required by law for the years 1952, 1953 and 1954. Appealing this conviction, he urges, first, that the court should have entered a judgment of acquittal because willfulness within the meaning of the statute[1] was not proved and, second, that the trial judge committed fundamental error in his charge.

The defendant is a physician whose income is derived principally from the ownership and operation of a small private hospital. No income tax returns were filed by him for the years 1952, 1953 and 1954 until March 16, 1956.

1. 26 U. S. C. § 145(a) is the controlling provision of the Internal Revenue Code of 1939, and, as to 1954, 26 U. S. C. § 7203. Both of these sections provide: "Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, . . . who wilfully fails to . . . make such return or declaration, . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000. or imprisoned for not more than one year, or both, together with the costs of prosecution."

Three extensions of time, aggregating the six-month legal maximum, had been granted postponing the required filing of the 1952 return until September 15, 1953. Similarly, extensions of time for filing the 1953 return postponed the due date until September 15, 1954. The 1954 return was not in default until October 16, 1955, as a result of similar extensions of time. These extensions were requested for the defendant by his accountant and the reasons given each year were that the accountant was ill and overburdened with work.

These explanations are to be contrasted with those offered by the defendant himself in writing and by his accountant orally in the spring of 1955, shortly after the defendant was notified by the Internal Revenue Service that it was investigating his failure to file returns. The excuses then given were that essential records could not be found after a dishonest bookkeeper had left defendant's employ, and that defendant—not the accountant this time—had been ill. Indeed, according to the defendant's 1955 story, the lost records had just been found, and the preparation of the returns was about to go forward.

When this case came on for trial only the accountant, other than character witnesses, testified for the defense. He then stated that he had discovered that records essential to the preparation of defendant's returns were missing in January 1954, and that he himself had found them more than a year later, in May 1955, mixed in with some of the defendant's medical records. The defendant is not shown as assisting in the search until he joined the accountant in looking for the records on one day in October 1954. Even this is somewhat at odds with testimony of a revenue agent that the defendant told him of beginning the seach for the missing records in December 1954, nearly a year after the date of discovery of loss as stated by the accountant.

The accountant also testified that the 1952 records of defendant's cash receipts and disbursements were incomplete and that as early as 1953 he undertook to instruct

defendant's changing clerical helpers in the proper procedures of record keeping. He characterized successive clerical employees of the defendant as "incompetent".

We think this evidence gave the jury an adequate basis for a finding that the defendant's failure to file income tax returns when due was "willfull" in that the omission was advertent and motivated by the bad purpose of preventing the government from receiving returns at the time required by law. To begin with, the delay in filing was great and persistent over three consecutive taxable years. Such a pattern of behavior, as distinguished from a single occurrence, itself suggests willfulness. Next, the excuses given to support requests for extensions of filing time were quite different from those given later to cover the same periods of delinquency. Moreover, on the defendant's own statement a very damaging inference could reasonably be drawn from the fact that financial records, which allegedly could not be found for a year and a half, appeared very quickly among defendant's medical papers after an official inquiry was announced. Along the same line, the jury may well have considered it revealing that the accountant complained to the defendant of inadequate records as early as his 1953 attempt to prepare a 1952 return, but did not receive adequate data until about the time the Internal Revenue Service instituted its 1955 investigation. There was enough here to justify the jury in concluding that the defendant intentionally persisted in a course calculated to avoid or to disable himself from supplying his accountant with information appropriate and adequate for preparing his tax returns until the danger of governmental action became obvious and imminent. Since the evidence invited these inferences and defendant offered nothing to counteract them we think he is now in no position to complain that the jury was persuaded that he acted with bad purpose, intending not to fulfill the obligation of timely filing of which he was well aware.

"Punctuality is important to the fiscal system; and these are sanctions to assure punctual as well as faithful performance of these duties." *Spies v. United States;* 1943, 317 U. S. 492, 496.

Defendant urges as a separate point that the trial judge committed plain and fundamental error in his charge defining the word "willful". The defense made no objection at the trial to this part of the charge, but reversal is now urged under claim of "plain error" within the meaning of Rule 52 (b) of the Federal Rules of Criminal Procedure.

The defendant reads the charge as failing to require bad intention as an essential element of willfulness. In the relevant part of the charge the judge told the jury that "willful" was the key word which they had to consider. The court went on to say:

> "The word 'willful' has a number of different meanings, depending upon the context with which it is used. As it is used in this statute with which we are dealing here today it means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent. Mere negligence or carelessness, even gross negligence, is not sufficient to constitute willfulness. This, of course, is a criminal proceeding, and the word 'willful' as used in this statute means an act done with a bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, perversely, or with a bad motive."

It is argued that the disjunctive "or" is so used in the last sentence of this quoted excerpt as to indicate that absence of legal justification, without regard for bad purpose, amounts to willfulness. *Cf. Yarborough v. United States,* 4th Cir. 1956, 230 F. 2d 56. But we think the arrangement of this sentence was of minimal significance in the light of the court's additional instructions which

rather clearly define the concept of bad purpose and require that the jury find a bad purpose in order to convict. Thus, the court said:

> "I charge you the only bad purpose or bad motive necessary for the Government to prove in this case, however, is the deliberate intention not to file returns which the defendant knew ought to be filed so the Government would not know the extent of his liability, so that is your problem, Ladies and Gentlemen, in a nutshell."[2]

Then, as the very last thing said to the jury, the court added:

> ". . . Now if you come to the conclusion the action, or lack of action, of this defendant in filing his returns was due to inadvertence or carelessness or negligence, even gross negligence, then you should acquit him. If, on the other hand, you are satisfied, beyond a reasonable doubt, that the defendant willfully failed to make these returns, with a bad purpose, of concealing from the Government the extent of his tax liability, then you should find him guilty."

In the light of the whole charge it is quite understandable that the single use of the particle "or", of which complaint is now made, did not impress counsel at the time as sufficiently misleading to require correction. We are satisfied that the charge as a whole did not convey the impression which the defendant now attributes to it. There was no fundamental error requiring correction in the absence of timely objection.

The judgment will be affirmed.

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2. Compare the statement of the Supreme Court in *Spies v. United States*, 1943, 317 U. S. 492, 497-8, that the concept of willfulness "may well mean something more as applied to nonpayment of tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental omission to make a timely return might meet the test of willfulness."

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,152.

UNITED STATES OF AMERICA

v.

BENJAMIN N. LITMAN,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

July 8, 1957.

APPENDIX D.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,152.

UNITED STATES OF AMERICA

v.

BENJAMIN N. LITMAN,
Appellee.

Order Denying Petition for Rehearing.

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By The Court,

/s/ WILLIAM H. HASTIE,
Circuit Judge.

Dated: August 6, 1957.

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In the Supreme Court of the United States

October Term, 1957

No. 428

BENJAMIN N. LITMAN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 6a-10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1957 (Pet. 11a) and a petition for rehearing was denied on August 6, 1957 (Pet. 12a). Petition for a writ of certiorari was filed September 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence of willfulness was sufficient to sustain the conviction.

2. Whether, where the instruction to the jury accurately covered every element of the offense, the trial court erred in refusing also to charge that if the failure to file timely returns was found to be due to the negligence of the petitioner's accountant a verdict of not guilty should be returned.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 145(a).)

Internal Revenue Code of 1954:

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7203.)

STATEMENT

On September 13, 1956, a three-count information was filed in the United States District Court for the Eastern District of Pennsylvania charging the petitioner with willfully and knowingly failing to file income tax returns for the years 1952, 1953 and 1954 within the time required by law. Counts one and two charged a violation of Section 145(a) of the Internal Revenue Code of 1939, and count three charged a violation of Section 7203 of the Internal Revenue Code of 1954. The information alleged that petitioner's gross income was $90,791.83 in 1952,

$81,856.81 in 1953 and $91,281.96 in 1954. (Pet. 1a-4a; R. 1a.) On December 4, 1956, after a jury trial of two days, petitioner was found guilty as charged (R. 1a, 84a-85a) and, on December 5, 1956, was sentenced to sixty days' imprisonment on each count, the sentences to run concurrently, and was fined $500 on the first count (R. 1a). The evidence to support the verdict may be summarized as follows:

Petitioner is a physician (R. 3a, 19a) who operates a hospital in Philadelphia, Pennsylvania (R. 18a, 38a, 44a, 77a). During the prosecution years he employed various bookkeepers to maintain the hospital records. (R. 39a.) Each year as the returns involved became due, requests for ninety day extensions of the time in which to file were made by his accountant, Charles Brahin (R. 11a-15a), after discussions with the petitioner (R. 36a, 58a), and the periods in which to file were accordingly extended (R. 11a-15a). Again, as these extended periods were about to expire additional successive extensions for varying lengths of time were requested and granted. Three such extensions were obtained for the 1952 and 1953 returns, respectively, and four were permitted for the 1954 return, thereby extending the time in which to file each of the returns a total of six months (R. 11a-15a), the maximum permitted under the law (R. 15a, 54a).[1] Accordingly, the 1952 return was due September 15, 1953, the 1953 return on September 15, 1954 and the 1954 return

[1] Section 53(a)(2), Internal Revenue Code of 1939, and Section 6081, Internal Revenue Code of 1954.

on October 15, 1955. (R. 12a-15a.) Each of the requests stated that an extension was sought because Mr. Brahin was ill and/or overburdened with work. (R. 12a-15a, 50a-56a.) However, at the trial Mr. Brahin testified that the requests were made on form letters, and that the extensions were actually sought because the petitioner's records were not complete. (R. 35a- 37a, 58a.) He further testified that each year, before the returns became due, he asked the petitioner to have the records completed so the returns could be prepared (R. 37a, 45a, 61a-62a), but petitioner failed to do so (R. 35a, 37a); that in October of 1954, when, at his own request, he was given the uncompleted 1952 and 1953 records, portions of the records were missing; that he called this to petitioner's attention and advised him that they must be located (R. 39a-41a); that he was subsequently regularly in contact with the petitioner, advised him that the returns must be filed, and explained the seriousness of the matter (R. 58a, 61a, 64a-65a); that at no time did he observe the petitioner searching for the missing records (R. 66a) though for approximately half a year (R. 41a) he came once or twice a month and searched for them himself (R. 40a).

In May of 1955 petitioner was first notified by the Internal Revenue Service that no record could be found of his 1952, 1953 and 1954 returns and he was requested to submit information and an explanation concerning his returns (R. 29a, 67a-68a.) Shortly thereafter, Mr. Brahin testified, he located the missing portions of the records among petitioner's medical

records at the hospital. (R. 26a, 29a, 40a-41a, 60a.) Though the petitioner advised the Internal Revenue Service in a letter dated June 6, 1955, that he intended to file the delinquent 1952 and 1953 returns (R. 23a)[2] and made similar representations to the investigating agent in December of 1955 concerning the 1954 return as well (R. 18a-19a), they were not filed until March 16, 1956 (R. 4a), after Mr. Brahin had personally secured a bookkeeper to complete the records (R. 62a). The delinquent returns disclose a gross income of $86,646.18 in 1952, $73,670.43 in 1953, and $83,944.56 in 1954. (R. 3a-4a.)

ARGUMENT

Petitioner first urges that the Government was required to show that his failure to file timely returns was, in addition to being voluntary, the result of an evil motive, and that it failed to do so. (Pet. 2, 10-12.) This Court said in *Spies* v. *United States*, 317 U. S. 492, 497-498, that "Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness." But, it is unnecessary to decide here whether mere voluntary failure to file timely returns meets the statutory requirement of willfulness, for this record demonstrates that the petitioner intended to deprive the Government of returns which he knew he was legally required to file. His act of omission was not only voluntary but done with full knowledge that he

[2] Under the extensions, the 1954 return was not due until the following October. (R. 14a-15a.)

was shirking his duty under the law; it was therefore a misdemeanor under the provisions of Sections 145(a) and 7203 (*supra*, pp. 2-3), and no other showing of evil motive is required. The further showing which petitioner would require is a requisite only under the felony provisions of Sections 145(b) and 7201.[3] Furthermore, the record here, in any event, clearly permits the inference that the petitioner's willful failure to file the returns when due was motivated

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[3] Internal Revenue Code of 1939:

SEC. 145.. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7201.)

by a desire to conceal his tax liability from the Government and escape payment of the tax.

Mr. Brahin testified that in January, 1953, when he came for petitioner's 1952 records they were not complete (R. 35a) and that they, along with the 1953 and 1954 records, were not completed until 1955 (R. 62a, 68a-69a) after investigation of petitioner's failure to file had begun, and when he, Brahin, personally secured a bookkeeper for the purpose (R. 62a); that as an accountant it was not his responsibility to do petitioner's basic bookkeeping but, in his practice, he regularly prepared returns from completed records furnished by his clients (R. 45a, 56a-57a, 61a); that he repeatedly advised the petitioner that it was his (petitioner's) duty to see that his records were completed and that returns must be filed (R. 58a, 61a-62a), and that he sought the extensions of the time in which to file only after discussion with the petitioner (R. 36a, 58a).

The Court of Appeals, after careful review of the evidence, concluded that (Pet. 8a):

> There was enough here to justify the jury in concluding that the defendant intentionally persisted in a course calculated to avoid or to disable himself from supplying his accountant with information appropriate and adequate for preparing his tax returns until the danger of governmental action became obvious and imminent.

The evidence was, therefore, clearly sufficient to support the conviction.

2. Petitioner also contends that the trial court erred in refusing to instruct the jury that if it found

that the failure to file timely returns was due to the negligence or carelessness of his accountant a verdict of not guilty must be returned. (Pet. 2, 12.) This contention is without merit. The jury was instructed (R. 82a):

> Now if you come to the conclusion the action, or lack of action, of this defendant in filing his returns was due to inadvertence or carelessness or negligence, even gross negligence, then you should acquit him.

As this Court noted in *United States* v. *Trenton Potteries*, 273 U. S. 392, 396, where, as here, an instruction is correctly given, the trial court may properly refuse to give the same basic instruction in another form.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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